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REPORTS OF CASES

IN THE

Supreme Court of Nebraska

JANUARY AND SEPTEMBER TERMS, 1930,
AND JANUARY TERM, 1931

VOLUME CXX

HENRY P. STODDART,
OFFICIAL REPORTER

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By Henry P. Stoddart, Reporter of the Supreme Court,

For the benefit of the State of Nebraska.

SUPREME COURT

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1930.

JULIA SULLIVAN FRANKS, APPELLANT, V. JEREMIAH HORRIGAN ET AL., APPELLEES.

FILED JUNE 6, 1930. No. 27364.

1. **Evidence:** STATUTES OF SISTER STATE: PRESUMPTION. The statutes of a sister state, in the absence of pleading and proof to the contrary, will be presumed to be the same as those of this state.
2. **Adoption:** ORAL CONTRACT: RIGHT OF INHERITANCE. "Even where there is no legal adoption, an oral contract to adopt a child and make it an heir, when saved from the operation of the statute of frauds by part performance, may be enforced in equity by awarding to the child an equivalent of such inheritance." *Wiseman v. Guernsey*, 107 Neb. 647.

APPEAL from the district court for Wayne county: CHARLES H. STEWART, JUDGE. *Reversed.*

James T. English, Crofoot, Fraser, Connolly & Stryker and *F. S. Berry*, for appellant.

George M. Harrington, M. F. Harrington and *C. H. Hendrickson, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

GOOD, J.

Plaintiff brought this action to enforce specific performance of an oral agreement, wherein and whereby Mary Horrigan agreed to adopt plaintiff and bestow upon her the same right of inheritance as if she had been a natural daughter, born in lawful wedlock. To the petition general

demurrers were sustained. Plaintiff elected to plead no further. Judgment of dismissal was entered. Plaintiff has appealed. We are required to determine whether the facts set forth in the petition are sufficient to constitute a cause of action.

The petition informs us that plaintiff was born in New York City in 1886 to Anna Cannon, and from the date of her birth until September 30, 1890, she was under the care, custody and control of the New York Foundling Hospital, having been placed with said institution by her mother for adoption, and that on the last mentioned date, when plaintiff was four years of age, the said institution, through its authorized representatives, entered into an oral agreement with Mary Horrigan which provided that, in consideration of the placing of plaintiff with her and the relinquishment by said institution of the care, custody and control of and right to plaintiff, the said Mary Horrigan was "to keep, treat and maintain plaintiff in the same manner and extent as if she were her own natural and legitimate daughter and to adopt plaintiff and to give to her the same legal status and rights of inheritance as a natural daughter would have, born of lawful wedlock." Then follow allegations of full performance of the contract, the marriage of Mary Horrigan to Eugene Sullivan, the death of both Eugene and Mary Sullivan, and that the latter died intestate and without issue born to her. The action was against the administrator of the estate of Mary Sullivan, deceased, and also against all the heirs at law of said decedent.

By their demurrers defendants admit the existence of the oral agreement, as pleaded, and full performance of its terms except the neglect of Mary Horrigan Sullivan to adopt plaintiff and give to her the same legal status and rights of inheritance as a natural daughter would have, born of lawful wedlock. They contend, however, that the petition does not state a cause of action for the following reasons: (a) Because it is impossible to enforce the specific agreement to adopt; that adoption of children was unknown to the common law and is solely a creature of

statute, and that our statute permits the adoption of minor children only and upon conditions prescribed by the adoption statute; that plaintiff is no longer a minor, and that it is impossible to comply with other conditions of the adoption statute; (b) because the adoption contract was made in Iowa and is governed by the laws of that state and should be construed with reference to the laws thereof; (c) because the contract does not relate to the giving or devising of property and is too indefinite to be susceptible of enforcement.

It is no doubt true that formal legal adoption of plaintiff is now impossible. Plaintiff concedes this to be true, and further concedes that, not having been, in fact, adopted, and not being a blood relative of Mary Sullivan, she is not a legal heir and cannot take by inheritance any of the estate of Mary Sullivan.

Whether the contract is, under the law of Iowa, a nullity cannot now be determined. If the statutes of a sister state are relied upon to afford other or different relief than those of this state, the laws of such state must be pleaded and proved, unless admitted. In the absence of such pleading and proof, or admission, the statutes of a sister state will be presumed to be the same as those of this state. The statutes of Iowa are not pleaded in this cause, and, if the applicable statutes of that state are different from those of this state, that fact cannot be considered on this appeal. The determination of these points, adverse to plaintiff, however, is not conclusive of plaintiff's right to recover.

Defendants' principal contention is that the contract does not provide specifically for the giving, bequeathing or devising of any property, and that if it did it is too indefinite, as to the property or amount thereof, to be enforceable. Contracts of this general character have been frequently before this court. The following quotations and excerpts from some of the authorities will suffice to illustrate the rules established by this court.

In *Pemberton v. Heirs of Pemberton,* 76 Neb. 669, it was held:

"A contract in writing for the adoption of a child, al-

though ineffective as a legal, statutory adoption, may upon a proper showing be enforced in equity.

"A written contract of adoption which contains a condition binding the foster-parents to make the child 'an equal heir to his part of our estate the same as one of our children' may upon a proper showing be specifically enforced against the estate of the deceased foster-parent, who has died intestate."

True, the contract in that case was in writing, but, under the frequent holdings of this court, an oral contract, if there has been such part performance as to take the case out of the statute of frauds, is as enforceable, in equity, as though it had been in writing. In the above cited case the written contract, among other things, provided: "We do further agree that at our death the said child shall be an equal heir to his portion of our estate the same as one of our children." In the opinion, after citing and discussing authorities from other jurisdictions, it was said (page 678): "As against these authorities it is of no avail to suggest that, notwithstanding the existence of the contract sued upon, the deceased could have disposed of his property as he pleased during his lifetime, by deed, devise, or otherwise. It is true that he might have done so, and also true that he did not. * * * And we think there is no reason in equity and conscience why a decree of specific performance of this contract should not be granted."

In *Parks v. Burney*, 103 Neb. 572, in an opinion by Sedgwick, J., it was held:

"An agreement to take a six year old boy 'as a son' and give him 'a child's share of my property' is sufficiently definite as to what the boy is to receive in case he performs the contract on his part. The fact that a child may be disinherited by will, or that it is uncertain how many children there will be to inherit the property, does not render such contract void for uncertainty.

"If such contract is definite, and is clearly proved, and substantial performance is proved by clear and unequivocal evidence, it has the same force as if written."

In the body of the opinion it was said (page 575): "It

is seriously contended that this evidence as to what he (plaintiff) should have is too indefinite to amount to a contract. It is urged that a child has no share in the parents' property if the parents see fit to dispose of the property otherwise, and that if Smith and his wife were then young people it is very indefinite and uncertain as to what any particular child's share would be if there should be other children. If, however, we apply the rule of construing this contract as the parties themselves then evidently understood it, and intended, these objections are not well taken. If the agreement to treat this boy as his son and give him a child's share of the property would not prevent the Smiths from disposing of their property or a part thereof to others by will, it at least was equivalent to a contract to make him an heir, and, as such, he would inherit with other heirs, if any, such property as Smith owned, undisposed of, at his death."

Tuttle v. Winchell, 104 Neb. 750, presents a situation very similar to that in the case under consideration. In that case it was held: "A parol agreement of adoption, whereby a parent surrenders a child to others upon their promise to adopt, rear and educate it as their own, and to give it the same right of inheritance as a natural child, but which is not consummated by a statutory adoption, will, if otherwise fully performed, be enforced in case the adoptive parents die intestate, by decreeing to the plaintiff the same share in their property to which he would have been entitled if the agreement to adopt had been fulfilled." In the course of the opinion it was said (page 758): "If the promise to adopt the plaintiff had been consummated by formal adoption under the statute, it would have carried with it a child's right of inheritance in the property of Mr. and Mrs. Tuttle. They made no will, and their property was left to descend by operation of law. Equity considers that done which should have been done, and, since the plaintiff's right to the share to which he would have been entitled if legally adopted can be recognized without violating any expressed intention of the

deceased to the contrary, the decree awarding him that share was just and equitable."

In *Wiseman v. Guernsey*, 107 Neb. 647, it was held: "The only manner by which the right of inheritance can be conferred by an adopting parent upon a child is by a legal adoption, conducted in substantial compliance with all the essential requirements of the statute.

"Even where there is no legal adoption, an oral contract to adopt a child and make it an heir, when saved from the operation of the statute of frauds by part performance, may be enforced in equity by awarding to the child an equivalent of such inheritance."

Were the question an open one in this state, the writer would feel disposed to take a different view than is expressed in the authorities cited. But the question has been so frequently determined and so firmly imbedded in our jurisprudence that it is not deemed wise to overthrow the rule so long and so firmly established.

Application of the rules laid down in the cited cases requires us to hold that the petition stated a cause of action. The demurrers should have been overruled.

The judgment of the district court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED.

CELIA STIEFLER, APPELLEE, V. LOUIS H. MILLER, APPELLANT.

FILED JUNE 6, 1930. No. 27152.

Appeal: INSTRUCTION. The court should submit to the jury only such issues as find some support in the evidence, and where an issue is submitted without support in the evidence and is calculated to mislead the jury in the consideration of the facts to the prejudice of the complaining party, the judgment must be reversed.

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Reversed.*

Crofoot, Fraser, Connolly & Stryker and *James T. English*, for appellant.

Leon & White, contra.

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON and DAY, JJ., and FITZGERALD and HASTINGS, District Judges.

HASTINGS, District Judge.

This case arose out of a collision between a Chevrolet coach owned by plaintiff, appellee, driven by one Boyer, and an Oldsmobile coupé owned and driven by defendant, appellant. At the time of the collision the Chevrolet coach was occupied by plaintiff and four other persons, two in the front seat and three in the back. Occupying the seat of the Oldsmobile with defendant were three persons, one of whom was sitting upon the lap of another. The collision occurred on the 24th day of June, 1928, at about 7:30 p. m. on Pacific street, in Douglas county, a short distance north and west of where a private driveway leading from the Highland Country Club intersects said street. Both the plaintiff and defendant claim to have sustained injuries on account thereof. Plaintiff brought this action to recover damages for personal injuries to herself and for damage to her automobile, alleging that the same were the result of the negligence of the defendant in the operation of his automobile. Defendant for his defense denied negligence on his part and pleaded contributory negligence, and, by a cross-action, sought to recover damages for injuries alleged to have been sustained by him in said collision. The jury returned a verdict for plaintiff and judgment was entered thereon, from which defendant appeals.

The case of *Lewis v. Miller*, 119 Neb. 765, arose out of the same collision and the evidence in the instant case is substantially the same as in that case. A further statement of the facts and circumstances surrounding the collision may be had by referring to that case.

Eleven errors are assigned by defendant as grounds for reversal. The greater part of the errors assigned are disposed of adversely to the defendant in *Lewis v. Miller, supra.*

The only assignments of error that need be considered relate to the giving of instructions Nos. 1, 4, and 13. The

question raised thereby is, that by such instructions there was submitted to the jury, without evidence to support it, the following act of alleged negligence: "That defendant drove his car at such time with his view obstructed and impaired by reason of the number of occupants in such car, and their position."

An examination of the instructions complained of discloses that instruction No. 1 is a general instruction setting forth, in substance, the six grounds of negligence alleged in the petition. Instruction No. 4 was to the effect that plaintiff could recover if she established, by a preponderance of the evidence, negligence on the part of the defendant in some one or more of the particulars alleged in plaintiff's petition as the proximate cause of the injury and damage to the plaintiff, unless the jury found that she was guilty of such contributory negligence as would bar her right to recover. In instruction No. 13, the court told the jury, in part:

"In determining what a reasonably prudent man using ordinary care would do under the circumstances, you are at liberty to consider, together with all other facts and circumstances, * * * the number of persons in the car of the defendant, and whether or not such fact obstructed his vision or movements."

By such instructions the court submitted to the jury, with other acts of alleged negligence, the act of negligence referred to. Counsel for defendant contend that such act of alleged negligence finds no support in the evidence, and that the submission of the same to the jury for their consideration was calculated to mislead the jury to the prejudice of the defendant. There is no evidence from which it might be inferred that defendant's view was obstructed by reason of three persons occupying the seat with him, except when looking directly to the south, and the fact that defendant's vision was obstructed by others in the car, when so looking, would not have prevented him from having seen the car of the plaintiff as it came from the private driveway into Pacific street.

In the case of *Lewis v. Miller, supra,* we held that the

submission of this act of alleged negligence was not prejudicial error although it did not find support in the evidence, for the reason that it clearly appeared that the jury were not misled thereby to the prejudice of the defendant. That case is clearly distinguishable from this. In that case Lewis was a passenger in the car of the plaintiff in this case and had nothing to do with its operation or control, and there was no evidence showing that he was guilty of contributory negligence. The negligence of the driver of plaintiff's car in that case, under the circumstances disclosed by the evidence, could not be imputed to him. In that case there was evidence sufficient to warrant the jury in finding that the other alleged negligent acts of the defendant, either alone or concurring with negligence of the driver of the car in which plaintiff was riding, was the proximate cause of the collision and the resultant injury to him. In this case a different situation is presented. Here the plaintiff was the owner of the car in which she was riding. Any act of negligence on the part of the driver of the car was her negligence, and if the driver of her car was guilty of negligence directly contributing to the injury complained of she could not recover, even though the defendant was negligent, unless her contributory negligence was slight and the negligence of the defendant gross in comparison therewith. We think the evidence in this case, as a whole, presented the question for the jury as to whether either the plaintiff or defendant, or both, was guilty of negligence. If the jury found both to be guilty of negligence, then it became their duty to compare the negligence of the parties in determining, as between them, the degree of their negligence.

The case was submitted to the jury upon this theory and no complaint on account thereof seems to be made by the parties.

We have held that: "In stating the issues of fact in its charge to the jury, the court should submit to the jury only such issues as are presented by the pleadings and are in controversy, and which find some support in the evidence." *Koehn v. City of Hastings,* 114 Neb. 106.

Also that: "The instructions of the court should direct the attention of the jury only to facts in support of which evidence has been introduced upon the trial. When an instruction is not founded upon the evidence, and is calculated to mislead the jury in considering the facts of the case, the judgment must be reversed." *Mannion v. Talboy,* 76 Neb. 570; *Trute v. Holden,* 118 Neb. 449. See *Spieler v. Lincoln Traction Co.,* 103 Neb. 339.

In the instant case, the court having submitted an act of alleged negligence which finds no support in the evidence, the question presented is: Was the submission of such act of alleged negligence calculated to mislead the jury to the prejudice of the defendant? We think it was. In the part of instruction No. 13, heretofore quoted, that particular act of alleged negligence is emphasized and the jury given to understand that, if the number of persons in the car of defendant obstructed his vision or movements, they might take such fact into consideration in determining as to whether or not defendant was guilty of negligence in that regard. The defendant's view was obstructed if he looked directly south, but the fact that his vision was so obstructed could not operate as a cause of or contribute to the collision. The submission to the jury of this act of alleged negligence would tend to lead them to assume and believe there was evidence to warrant a finding thereon. The fact that there was sufficient evidence to warrant the jury in finding that defendant was guilty of the other acts of alleged negligence does not operate, in this case, to relieve the submission thereof of its prejudicial character. If the jury found that plaintiff was guilty of contributory negligence, then it became their duty to make a comparison of the negligence of the parties; and if they found that defendant was guilty of the act of alleged negligence, the submission of which is complained of, it might become an important factor with them in determining whether the negligence of the defendant was gross in comparison with that of the plaintiff. The submission of such issue was calculated to mislead the jury to the prejudice of the defendant.

The conclusion reached renders unnecessary the consideration of other alleged errors.

For the reasons pointed out, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

The following opinion on motion for rehearing was filed October 24, 1930. *Former judgment of reversal vacated, and judgment of district court affirmed.*

1. Negligence: EVIDENCE. Evidence examined and summarized in the opinion *held* not to disclose contributory negligence on the part of plaintiff, and to require a finding that defendant was guilty of actionable negligence which proximately caused plaintiff's injury.
2. Appeal: INSTRUCTION: HARMLESS ERROR. Where, under the issues, the evidence is such as to require a verdict for plaintiff, error, if any, in giving or refusing instructions to the jury, not relating to the measure of recovery, is harmless.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

GOOD, J.

This is a rehearing of the case of *Stiefler v. Miller, ante*, p. 6. It is an action to recover damages resulting from a collision of two automobiles, and is one of a series of cases arising from the same accident. Judgments for plaintiff against the same defendant in two of the actions have been affirmed by this court. See *Lewis v. Miller*, 119 Neb. 765, and *Ziskovsky v. Miller*, p. 255, *post*. The facts reflected by the record in this case are almost identical with those detailed in the opinion in *Lewis v. Miller, supra*, and reference is made thereto and to the former opinion in this case for a detailed statement of the situation.

The former opinion reversed a judgment for plaintiff, on the ground that the court committed prejudicial error in submitting to the jury one of the alleged acts of negligence which was not supported by evidence, namely that defendant's view was obstructed by reason of the number of persons and their situation in his car. The opinion went on the assumption that plaintiff may have been guilty of

contributory negligence, and the submission of this ground of alleged evidence was calculated to mislead the jury and was therefore prejudicial.

The collision occurred a short distance northwest of the point where the private driveway from the Highland Country Club connects with Pacific street. Plaintiff's car had entered Pacific street and was turning west on the north side of the highway, and defendant was rapidly approaching the same point from the west and was also traveling on the north side of the highway, when he should have been on the south side. The evidence shows without dispute that, prior to entering Pacific street, plaintiff's car was stopped; the driver and at least one other occupant looked both to the east and west, and no vehicle was in sight when they started to enter Pacific street. The evidence also shows without any substantial dispute that plaintiff's car was not traveling more than five or six miles an hour and had nearly come to a stop at the instant of the collision. This state of facts being reflected entirely fails to support any theory of contributory negligence on the part of plaintiff or her driver. It therefore follows that the distinction between the situation presented by the instant case and that of the *Lewis* case, assumed in our former opinion, did not exist.

Furthermore, the evidence discloses without dispute, not only that plaintiff was without fault, but that defendant was guilty of negligence beyond question in the following respects: That he was driving on the wrong side of the highway at a high rate of speed and without keeping a proper lookout for other travelers or obstacles upon the highway, and that the brakes on his car would not and did not operate. Defendant admitted that he was traveling at the rate of 40 miles an hour, and the evidence for plaintiff would indicate that it may have been 50 or 60 miles an hour. Defendant, himself, testified that he did not see plaintiff's car until his attention was called to it by another occupant of his car; that plaintiff's car was then not more than 50 to 75 feet distant and in the center of the highway. This state of facts demonstrates beyond

the peradventure of a doubt that defendant was guilty of negligence which was the proximate cause of plaintiff's injury. In this view of the case, no other verdict than one for the plaintiff was justified.

Defendant complains of the giving and refusing of instructions to the jury. Since no other verdict than one for the plaintiff could have been sustained, any errors in the instructions, unless they related to the measure of plaintiff's recovery, were not prejudicial. None of the instructions of which complaint is made related to the recovery; hence, it is unnecessary to discuss them.

One of the errors assigned by defendant is that the damages are excessive, but this assignment is not discussed in the brief, and, in fact, from a perusal of the entire record, it appears that the amount of recovery is not excessive.

No error prejudicial to the defendant has been found. Our former opinion is hereby modified; the former judgment of reversal is set aside, and the judgment of the district court is

AFFIRMED.

CLARA E. EBMEIER, APPELLEE, V. PETER EBMEIER, APPELLANT.

FILED JUNE 12, 1930. No. 27374.

1. **Husband and Wife:** ACTION FOR ALIENATION OF AFFECTIONS: DAMAGES: REMITTITUR. In an action brought by a wife against a father-in-law for the alienation of the affections of her husband, the jury are the triers of the weight of the evidence. And in such case, where the jury returned a verdict in the sum of $9,000, the court did not err, in view of the facts, in requiring the plaintiff to remit $3,000 from such verdict.
2. ———: ———: MALICE. "From repeated, deliberate, wrongful acts of a third person, resulting in the alienation of the affections of a husband from his wife and his abandonment of her without cause, malice of such third person may be inferred." *Hope v. Twarling*, 111 Neb. 793.
3. **Evidence** examined and *held* to support the verdict and judgment thereon.

APPEAL from the district court for Gosper county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

H. G. Wellensiek and *Frank A. Anderson,* for appellant.

O. E. Bozarth, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

DEAN, J.

Clara E. Ebmeier began this suit in the district court for Gosper county against Peter Ebmeier, defendant, to recover damages in the sum of $25,000, for the alleged alienation, by defendant, of the affections of her husband, Herman J. Ebmeier, the defendant's son. The jury returned a verdict for plaintiff in the sum of $9,000, but the court required that plaintiff file a remittitur of $3,000, and thereupon a judgment was rendered against the defendant for $6,000, with interest at 7 per cent. per annum from November 7, 1929, until paid. The defendant has appealed.

The record discloses that, on May 24, 1927, the plaintiff arrived in Nebraska from her home in Germany and that shortly thereafter she found employment as a domestic in the defendant's home. November 24, 1927, or six months after her arrival in this state, the plaintiff and defendant's son were united in wedlock. The plaintiff was then under twenty-one years of age and her husband was in his thirty-fourth year. It is not denied that the defendant paid the transportation and other expenses of plaintiff's ocean voyage from Germany, amounting to $250, or about that sum, but it appears that plaintiff never received remuneration for work performed by her in the defendant's home.

Plaintiff contends that, to escape liability for the payment of current or usual wages to her, the defendant caused her to marry his son. But the plaintiff informed the jury that the defendant induced his son to abandon her and that he sought, soon thereafter, to cause the plaintiff to return to Germany. It also appears that, very shortly after the marriage, the plaintiff and her husband became tenants upon one of the defendant's farms, which was about two

miles from defendant's home, and that, on the farm, they lived happily together so long as they were unmolested by the defendant. But she alleges that, some time after the marriage, the defendant began to criticize and to find fault with her, without cause, and that he falsely charged her with having mistreated his son, who was then her husband, and that, as a result of the defendant's continuous unfriendly conduct in the premises, her husband became estranged, cold, and unsympathetic toward her, and the love and affection that her husband formerly lavished upon her was thereby utterly destroyed.

The plaintiff began a suit to obtain a divorce some time after the defendant and her husband, as she alleges, "had both personally refused to permit and allow the plaintiff to reside with her husband as his wife, and because she was a stranger in a strange land, inexperienced and not acquainted with the ways of the country in which she then found herself without means of support and after the defendant and her husband had refused to contribute to her support."

In defense, the defendant father-in-law alleged that the $250 that he advanced to plaintiff was to cover the expenses incident to her journey from her native land to the United States, and that it was agreed that plaintiff should work in his home as a domestic until she had repaid him for the money so advanced. In respect of the plaintiff's personality, he alleged her to be "of an exceedingly nervous temperament, easily excitable, very irritable, and has an ungovernable temper, and imperious and autocratic disposition." He denied that he ever advised plaintiff's husband concerning his personal affairs or his marital relations with plaintiff. But these features of the present case were questions of fact for the jury to determine.

In respect of the defendant's views on the subject, before plaintiff and his son were married, the plaintiff submitted these, among other facts, to the jury: "He (the defendant) said, 'Do you like Herman?' and I said, 'Yes,' and he said, 'Do you think you could marry?' and I said, 'Yes.'" Plaintiff also testified that she told the defendant

that she wanted to write to her father in Germany before she was married, but that defendant said, "Well, if you want to write to your father, until that letter comes back, by that time you are married." It appears that she yielded to the defendant's wishes and that she did not write to her father until after the marriage.

Plaintiff also testified that at one time, about a year after their marriage, she took the family car and drove to the mail box for the mail, and that, while she was there, the defendant drove up and took the key out of the car which she had driven, and told her he was going to give the key to his son. Continuing, she testified that the defendant then drove away in his own car and left plaintiff standing alone at the mail box and she was compelled to walk back to the house.

In referring to her husband, the plaintiff testified: "Well, we got along; all of the time from the time he (defendant) come over there Herman was not like he was. Q. Tell any other time he came over there. A. He came many times over there."

Concerning an incident when plaintiff was ill, she testified that the next day when defendant came over he said to her: "Well, you are not sick; you are just playing sick," and that she replied, "Yes, I am; I told Herman to take me to the doctor and he didn't do it." Defendant then said: "Well, if you just want to play sick you go back to Germany; Herman don't need to give you the money, I give you the money and you go back to Germany." At another time a calf upset a bucket of milk, and the defendant, blaming her for this circumstance, then said this to her in an imperious manner: "That is no work from a young woman to let the calf throw the milk over." But plaintiff testified that she was not present at the time of the accident.

On another occasion the plaintiff returned to her home and found the defendant there talking with her husband. She testified that her husband was crying at the time, and when she asked him what was the matter, the defendant interposed with this observation: "You don't need to ask; he can come home any time; he can come home with

me any time; my door is open; and you can go." The defendant then approached his son and said: "Herman, didn't she lick you; didn't she lick you?" and Herman replied, "Yes." But the plaintiff denied this charge, and she testified that defendant then said to her: "You go, I pay you $15 a week." But the plaintiff testified that she refused to leave her husband because she loved him.

The plaintiff also testified that, on the day before she left her home, referring to her husband and herself, she said: "We went out and milked the cows and came in, and we ate breakfast; out in the barn I asked Herman, 'What time is it?' and he didn't answer me then, and I said, 'Herman, what did I do to you that you don't answer?' and he didn't say anything; and I said, 'Herman, can you not tell me what you got against me?' He said, 'I have to stick by my father; nobody else going to give me anything but my father;' and so after that we went into the house and we ate breakfast, and then I asked him again, and he said, 'I don't care; you can go; I don't care a bit any more; I have to stick to my father.' " It appears that plaintiff then walked to a neighbor's house and when she returned to her home she said to the defendant: "Dad, can I come back to Herman again?" but he said, "No; you left once and you can not come back."

The defendant denied that his son ever told him about any trouble between himself and his wife, and he testified that he learned of some trouble between them from other of his sons and from his own wife. But the following letter was written by the defendant and sent to his daughter-in-law after she was separated from her husband:

"Bertrand, Nebraska,
"May 9th, 1929.

"Clara Ebmeier,
"Bertrand, Nebraska.
"Dear Clara: You should come back to my house and I board you for nothing and if you are able to work I pay you farmers average wages. And if you don't want to take that I try to send you back to your father in Germany and I pay the ticket and expense and even pay you by the

week when you go over there. And even I send a doctor along clear to New York to the ship and if you prove that the doctors on the ship couldn't handle you I would send a doctor along clear to your father.

"(Signed) Peter Ebmeier."

The above letter does not appear to need explanation, but the defendant explained to a witness just what he meant when he wrote it. This witness testified: "Q. Did you read the letter? A. Yes, sir; so after I read the letter I asked Mr. Ebmeier, I says, 'Do you mean that Clara should come to your house and live with Herman as husband and wife?' Q. What did he say? A. 'No, no;' he says, 'I didn't mean it that way;' he says, 'She come here and work for me; Herman is going away.'"

The defendant complains that the court erred in the giving of certain instructions on behalf of the plaintiff and in refusing to give certain instructions requested by the defendant. Upon an examination of all of the instructions complained of by the defendant, we conclude that the learned trial court did not commit reversible error in the respects noted by the defendant. That the burden is upon a party litigant to establish every material fact upon which he relies is an established rule in this jurisdiction, and that plaintiff comes within this time honored rule clearly appears. That defendant's conduct was malicious throughout cannot be successfully controverted. In *Hope v. Twarling*, 111 Neb. 793, we said:

"In an action against a former mother-in-law for alienating the affections of her son from plaintiff, his wife, the failure of the trial court to submit to the jury the defense of parental advice is not erroneous, if there is no evidence to support a finding in favor of defendant on that issue."

We think the language of the above citation is applicable to the facts as relating to both of the parties before us in the present case. In the *Twarling* case this was also said:

"From repeated, deliberate, wrongful acts of a third person, resulting in the alienation of the affections of a husband from his wife and his abandonment of her without cause, malice of such third person may be inferred."

As pointed out herein, the defendant lived but a short distance from the plaintiff and her husband while they were on one of his farms and he often called on them there. The record throughout discloses the defendant as assuming the demeanor of an overbearing, insufferable autocrat in all of his interviews with his daughter-in-law, and that he attempted to assume the guardianship of both the newlyweds. And it may here be noted that the record discloses that plaintiff's husband was capable of managing his own business affairs without the meddling interference of the defendant. But for his unreasonable conduct toward his own son and his son's wife they would doubtless now be living happily together.

Plaintiff complains because the court ordered a remittitur of $3,000. But, in view of the fact that the learned trial court saw and heard the witnesses and therefore had a better opportunity to judge the weight of the evidence, we are not disposed to disturb the judgment in respect of the remittitur so ordered by the court.

The judgment of the district court is right and is therefore in all things

AFFIRMED.

NORFOLK PACKING COMPANY, APPELLEE, V. AMERICAN INSURANCE COMPANY OF NEWARK, APPELLANT.

FILED JUNE 12, 1930. No. 27115.

1. Insurance: POLICY: CONSTRUCTION. Where the evidence describes a husking shed, used in connection with a canning factory, containing husking machines and a belt conveyor for conveying cobs and husks from the shed, dumping them on the lower or receiving end of the husk elevator, the receiving end of the husk elevator being fastened by a large king-pin in a concrete pit three feet deep and immediately adjacent to the husking sheds, and the discharging end of the husk elevator with its steel frame or boom resting on a steel track attached to the top of a concrete wall about twelve feet high some sixty feet away from the pit, *held*, that the husk elevator, with its steel framework or carriage, being the particular property damaged, is, under the circumstances set forth in the opinion, a

part of the husking sheds, within the meaning of, and covered by, the words in the policy, "on the frame husking sheds."

2. ———: PROOF OF LOSS: WAIVER. "The right of an insurance company to notice and proof of loss is a right which the company may waive; and when the insurer denies all liability for the loss and refuses to pay the same, and places such denial and refusal upon grounds other than the failure of the insured to give notice or to furnish proof of the loss, such denial and refusal avoid the necessity of such notice." *Omaha Fire Ins. Co. v. Dierks & White*, 43 Neb. 473, followed.
3. Judgment: RES JUDICATA: ACTION ON INSURANCE POLICY. In a suit on an insurance policy, where the defendant company seeks to prorate the loss under the terms of the policy and predicates such right on the ground that there was "other insurance" on the property damaged, and the evidence discloses that a court of competent jurisdiction has held in a former action that said "other insurance" did not cover the property damaged, and that said judgment was not appealed from, *held*, that such judgment as to said "other insurance" is a final determination of the fact that it did not cover the property damaged, and the company is not entitled to prorate its loss under the policy.
4. Evidence examined and *held* sufficient to support the judgment of the trial court.

APPEAL from the district court for Madison county: DE WITT C. CHASE, JUDGE. *Affirmed.*

C. C. Flansburg, for appellant.

W. L. Dowling and *Shurtleff & Spillman, contra.*

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and DAY, JJ., and CARTER, District Judge.

CARTER, District Judge.

This was an action brought in the district court for Madison county by the plaintiff, appellee herein, against the defendant, appellant herein, for damages under a tornado policy of insurance. The district court upon a trial of the case, a jury having been waived, found for the plaintiff and entered judgment against the defendant for $3,000, whereupon an appeal was taken to this court.

The defendant urges that the trial court erred, (1) in holding that the property damaged was covered by the policy, (2) in holding that there was a waiver of proof of

loss, (3) in entering judgment for the entire face of the policy and in ignoring all provisions of the policy relating to additional insurance, and (4) in entering judgment for $3,000, for the reason that such a judgment is excessive.

The first question raised by the defendant is whether or not the property damaged was covered by the policy of insurance. The insurance policy in this case is known as a Nebraska standard form tornado policy. In order to understand the question here presented, the descriptions of the property insured as contained in the policy are set out as follows: "$15,000 on the three story composition-roof brick building, its additions adjoining and communicating, including foundations, plumbing, electric wiring and stationary heating and lighting apparatus and fixtures; also all permanent fixtures (except outside awnings and signs), stationary scales and elevators belonging to and constituting a permanent part of said building, occupied as a canning factory situated on the east quarter of section 15, in township 24, range 1, Madison county, town of Norfolk, Nebraska;" and "$3,000 on the frame husking sheds. Other concurrent insurance permitted."

The evidence discloses that the Norfolk Packing Company, the plaintiff, was the owner of a canning factory near Norfolk, Nebraska, consisting of several buildings, one of which was a three-story, composition-roof, brick building. About 50 feet away was a building referred to in the policy as "the frame husking sheds;" it being approximately 250 feet in length and 40 feet in width. It was constructed of lumber, rested upon concrete foundations, had a wooden floor upon which rested 20 husking machines weighing 1,000 to 1,500 pounds each, was boarded up on the sides for about 3 feet, then open 5 or 6 feet, and then boarded up to the roof. In this husking shed the husks were stripped from the corn, which husks, together with the cobs, were carried to the east end and outside of the husking shed by an endless belt conveyor running east and west the entire length of the building. About 6 feet east of the east end of the husking shed was a concrete

pit about 3 feet deep. In this pit was a steel structure supporting another open endless belt conveyor, which will hereafter be referred to as the "husk elevator" as a matter of convenience. This husk elevator was used to pick up the husks and cobs carried to it by the conveyor in the husking sheds, carry them to the east end of the husk elevator and dump them in piles on the ground. The husk elevator was 60 feet in length and was fastened to the floor of the concrete pit with a king-pin 12½ inches in length and 6 inches in thickness. This husk elevator was supported at its east end by a semicircular wall about 12 feet in height. Upon the wall was a one-rail track, and on the east end of the husk elevator were iron wheels which were made originally to roll on this track, causing the husk elevator to move on its radius so that husks and cobs could be distributed over this segment of a circle by simply moving it one way or the other. The evidence establishes the fact, however, that before this policy was written the husk elevator had been made rigid and stationary by means of steel cables connecting its eastern extremities with concrete "dead men" buried in the ground and by steel wedges placed under the wheels to prevent their rolling in either direction. The west wall of the concrete pit referred to supported four large timbers which ran through the full length of the husking shed. These timbers were connected to the husk elevator by a sheet-iron apron which was bolted to the timbers and to the husk elevator. This husk elevator was damaged by a windstorm, and it is for this damage that action was brought on the policy.

It is the contention of the plaintiff herein that, the policy in question being the Nebraska uniform standard form, every provision of the printed form applied equally to both of the buildings described therein, and particularly that the words of definition and description in the rider applied with equal force to "the frame husking sheds" as it did to the other building described in the policy. To this argument we cannot agree. A contract of insurance is a voluntary one and the parties thereto have a right to incorporate therein such provisions and conditions as they

see fit to adopt, provided the conditions and provisions are not in violation of law or public policy. Section 7836, Comp. St. 1922, clearly indicates that the description of the property insured is a matter of contract between the parties and that the legislature did not intend to add anything to or take anything from the descriptions and specifications of the property insured as described in the policy. This being true, whether or not the property injured was covered by the policy is purely a matter of construction of the words of description used in the insurance contract.

In this case each of the items of property insured are separate and distinct from the other and constitutes what is known as a "divisible policy." Such being the case, the policy should be considered as if there was a separate insurance contract issued on each of the two items of property insured. This leaves for our determination the question whether or not the property damaged was a part of "the frame husking sheds" described in the policy.

It will be noted that the property damaged was described as "the frame husking sheds," rather than the frame building, and is descriptive of the character, construction, purpose and use of the building insured, rather than a limitation of the risk to any particular part. The frame husking sheds were used to carry in the corn, husk the same, cut the corn from the cobs, and carry the husks and cobs from the building. That the husk elevator was a very necessary part of this operation is very apparent.

The evidence discloses that the husk elevator was attached to certain wooden beams that were the chief supports of the heavy machines inside the building. It also discloses that the conveyor running the length of the shed carried the husks and cobs to the husk elevator in question which carried them on and dumped them on the ground. This evidence clearly shows that the husk elevator was attached to the building and an integral part of the use to which the husking shed was put. The evidence also indicates that it was the intent of the insured that the property damaged was to be a permanent fixture of the building. While it is true that it could have been removed

without damage to the building, still that fact is not a controlling feature. The husk elevator did not have a common and general use but was purchased for use with the frame husking sheds. Its very nature shows that it was limited to a definite use in connection with certain manufacturing industries. The policy having been written on the premises by the agent of the defendant, the facts above mentioned, which were visible and easily observed, will be considered in determining the construction to be placed on the terms of the policy.

In holding that a track scale bought to be used with, and mainly employed in carrying on the business of, a grain elevator, to which it is visibly connected, was a fixture to such elevator, the supreme court of Iowa used the following language which we feel should be applied in this case:

"It is plain, from the record, that the land on which the elevator was placed was leased, and the elevator placed in close proximity to the railroad track, because the elevator was to be used in receiving and shipping grain over the line of road, and that, as to the cars on the track, grain was to be transported to and from the elevator. The elevator was used for the purpose of shelling corn and cleaning grain for shipment, in which case cars were unloaded into the hopper connected with the scale, and by means of conveyors taken to the building for such purposes as might be required. The entire testimony in the case shows that the scale was bought for use with the elevator, and, after being adjusted, it was mainly used for the purpose of carrying on the business of the elevator. It seems to have been as much a part of the elevator, for the purpose of its business, as the machinery in the elevator, and for such purposes as closely connected therewith. The connection of the scale to the elevator by means of the hopper frame was open, visible, and could easily be known by all." *McGorrisk v. Dwyer*, 78 Ia. 279.

For the reasons above set out, we believe that the description in the policy is fairly susceptible of the construc-

tion claimed for it by the plaintiff that it was intended to cover the property damaged.

The next contention raised by the defendant is that the trial court erred in holding that there was a waiver of proofs of loss as required by the policy. The policy of insurance contained a clause providing in substance that in the event of loss the insured shall, within 15 days, give notice of such loss in writing to the company, and within 60 days after the date of the tornado, windstorm, or cyclone render a statement to the company signed and sworn to by the insured stating the interest of the insured and all others in the property, etc. Said policy also provided that all claim for any loss or damage shall be forfeited by failure to furnish proofs of such loss or damage within the time and in the manner above provided.

The defendant contends that the failure to furnish proofs of loss sworn to by the assured bars a recovery. No proof of loss was made by the plaintiff other than the notice of the damage given to the local agent and the communication of the same to the state agent. But plaintiff insists that, under the facts shown by the evidence, the defendant waived written proofs of loss required by the policy. Whether or not there was a waiver as contended by the plaintiff is a question that must be determined by the conduct of the parties as disclosed by the evidence.

The evidence shows conclusively that the next morning after the windstorm Mr. J. W. Ransom, one of the defendant's local agents at Norfolk, Nebraska, who wrote the policy sued on, was notified of the windstorm damage by the managing agent of the plaintiff, who gave such information as he had concerning the damage. Thereafter Mr. Earl Ransom, son and partner of J. W. Ransom, immediately wrote to Mr. E. R. Perfect, the defendant's state agent at Omaha, notifying him of the loss; and within a few days thereafter the state agent went to Norfolk, and he and J. W. Ransom drove out to the canning factory and looked over the damaged property. Earl Ransom testified that the state agent told him after the inspection

that he did not believe the company was liable for the reason that the damaged property was not covered by the policy.

It appears from the evidence that Mr. Wilbur M. Derthick of Sioux City, Iowa, attorney for plaintiff, had considerable correspondence with Edward S. Foltz, acting manager of the loss department of the defendant company. In answer to a letter of December 18, 1920, Mr. Foltz on December 24, 1920, wrote to Mr. Derthick in part as follows:

"The second item under our policy is $3,000 on 'frame husking sheds.' We are sincerely of the opinion that this insurance, 'frame husking sheds,' applies specifically and only upon the shed in question, because the quoted phraseology specifically identifies a particular shed. With indulgence, we direct your attention to the fact that the insurance on 'husking shed' is not in the phraseology as the item upon the brick building, but the language specifically limits the insurance to the 'husking shed.'

"With further indulgence say we judge you have been erroneously advised as to the investigation made in the premises, because it was the American that made the investigation, which was through our state agent, Mr. E. R. Perfect of Omaha."

On January 10, 1921, Mr. Foltz again wrote Mr. Derthick in part as follows:

"This is to now advise that in consultation with Manager Sheldon, inasmuch as full facts in the premises are not before us, we have concluded to make an additional investigation, which may take a week or ten days, and on receipt of the report from our representative, we will confer with you again. Now in the matter of your personal conversation with the writer and offer of figures, etc., in the matter of settlement of the loss, I also brought to Mr. Sheldon and he said he was not in position at this time to intelligently consider the matter, but as I take it, Mr. Sheldon will take up the matter in entirety when he gets the report of the investigation he is now causing to be made."

On February 3, 1921, Mr. Foltz again wrote Mr. Derthick in part as follows:

"Our investigation disclosed in the first place there was no windstorm, cyclone or tornado on the day in question when the damage ensued. There was not a semblance of damage in the vicinity of the property in question, nor in the county in which the property is located, which establishes that there was no windstorm or storm of velocity. * * * Be further advised that our investigation disclosed that this apparatus was in no wise a part of the building in question, but was a separate distinct apparatus or machinery, and consequently our policy does not cover except on the building."

These letters contain no reference whatsoever to the failure to file proofs of loss, and considering the fact that the damage occurred on September 23, 1920, we believe the evidence and circumstances show a waiver of proofs of loss. Notice of the loss having been promptly given and the company having acted upon it and entered upon the work of inspecting the property and investigating the circumstances to the extent shown by the evidence, the insurance company cannot be permitted to escape liability because formal proof of loss was not given. In *Union Ins. Co. v. Barwick,* 36 Neb. 223, 231, Mr. Chief Justice Maxwell, speaking for the court, said: "A company may have notice from their own agent at a given point that a certain loss has occurred, and if it acts upon that information and sends an adjuster to estimate the amount of the same, etc., it is no doubt a waiver of proof." It is a well-established rule of law that if an agent or adjuster of the company assumes to act for the company in adjusting and investigating the loss and denies a liability, the company is bound by the denial, and notice and proof of loss is waived. *Farrell v. Farmers & Merchants Ins. Co.,* 84 Neb. 72; *Brown v. Firemen's Ins. Co.,* 106 Neb. 615.

In this case the defendant carried on correspondence with plaintiff's attorney long after the 60 days for making final proof had expired and not once was objection made for that reason. The evidence clearly shows that the com-

pany was previously to, as well as after, the expiration of the sixty-day period, denying liability on the grounds that there was no windstorm to cause damage, and that the property damaged was not covered by the policy. Under such circumstances the defendant has waived proofs of loss. *Omaha Fire Ins. Co. v. Dierks & White,* 43 Neb. 473; *Aetna Ins. Co. v. Simmons,* 49 Neb. 811; *Dwelling House Ins. Co. v. Brewster,* 43 Neb. 528.

The defendant further contends that the trial court erred in ignoring the provisions of the policy relating to additional insurance. The policy contained the following clause:

"If there shall be any other tornado insurance or contract of tornado insurance, whether valid or not, on the property described herein, claim upon this company shall be only for such proportion of the loss as the amount of this policy shall bear to the whole insurance."

The defendant alleges that the Phœnix Assurance Company, Limited, of London carried a $5,000 policy of insurance on the property damaged, and that the defendant company is liable, if at all, only for its *pro rata* share of the damage. The record discloses that the plaintiff sued the Phœnix Assurance Company on its policy, and that the defense set up was (1) that the property damaged was not covered by the policy, and (2) that there was no windstorm on the day the damage occurred, and (3) that proofs of loss had not been furnished as required by the policy. The reply was a general denial of the first two defenses and set up a waiver of proofs of loss as to the third. The findings of the trial court in said action were as follows: "The court finds that there is no proof sufficient to establish plaintiff's cause of action or any liability on the part of defendant to the plaintiff under said policy of insurance and that plaintiff has failed to prove its case." The issue as to whether the policy of insurance of the Phœnix Assurance Company covered the property damaged having been raised in the case of the Norfolk Packing Company v. Phœnix Assurance Company tried in the district court for Madison county, decided adversely to the plaintiff

therein, and not appealed from, shows that, as a matter of law, the policy of the Phœnix Assurance Company did not cover the property damaged. The contention of defendant that it is liable, if at all, for a *pro rata* part of the amount of its policy is without merit.

Defendant also complains that there was not sufficient evidence of the value of the property damaged to support the judgment of $3,000. After a careful examination of the evidence, we find that it was sufficient to uphold the judgment entered by the trial court.

For the reasons herein set out, the judgment is

AFFIRMED.

PEOPLE'S STATE BANK, APPELLEE, V. JULIA A. SMITH, APPELLANT.

FILED JUNE 12, 1930. No. 26933.

1. **Husband and Wife**: MARRIED WOMEN: POWER TO CONTRACT. Under the law of Iowa, a married woman may, by contract, obligate herself to the same extent as if she were single.
2. ———: JOINT NOTE: EXTENSION: CONSIDERATION. Under the law of Iowa, extension of time for payment of husband's debt constitutes a sufficient consideration to bind the wife, where she joins him in the execution of a promissory note for its payment, if, by so doing, it was the intention of all the parties that she should be personally liable for the debt.
3. ———: ———: LIABILITY OF WIFE. Where a married woman joins with her husband in executing a promissory note for his preexisting debt, and also in the execution of a real estate mortgage to secure its payment, under an agreement with the payee that the sole purpose in signing the papers is to bind her dower and homestead rights in the mortgaged premises and that she shall not be personally liable on the note, a personal judgment cannot be rendered against her in an action by the payee on such note.
4. **Parol Evidence**: NOTES. In an action on a promissory note between the immediate parties thereto, testimony tending to prove the purpose for which a note is given does not violate the "parole evidence rule." Such evidence is specifically admissible under the negotiable instruments law. Comp. St. 1922, sec. 4627.

5. **Action:** DEBT NOT DUE. A debt not due at the commencement of a suit does not furnish the basis for a cause of action though maturing pending suit.
6. **Bills and Notes:** ACCELERATION OF MATURITY. Facts upon which accelerated maturity of a debt is claimed should, in the absence of concealment or fraud, arise after the obligation is incurred.
7. ———: MATURITY: PLEADING. When proof of maturity is an essential part of plaintiff's case, a general denial properly raises the issue of immaturity.
8. **Contracts:** AMBIGUITY. An ambiguity in a written contract prepared by one of the parties should ordinarily be resolved in favor of the party who did not prepare it and had no choice in the selection of words used nor in the arrangement of the sentences and punctuation.
9. **Evidence:** LAWS OF SISTER STATE. The laws of another state are presumed to be the same as in Nebraska, in the absence of pleading and proof to the contrary.
10. **Appeal:** DIRECTION OF VERDICT. An appellate court, in reviewing the action of the trial court in directing a verdict, must regard as conclusively established every point favorable to the unsuccessful party which the evidence tends to establish. *Vrbsky v. Arendt*, 119 Neb. 443.

APPEAL from the district court for Saunders county: HARRY D. LANDIS, JUDGE. *Reversed, with directions.*

H. A. Bryant, for appellant.

Slama & Donato and *Lee, Steinberg & Walsh, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and THOMSEN, District Judge.

THOMSEN, District Judge.

This action is brought to recover on notes signed by defendant and her husband. The debt was originally that of the husband. He died August 27, 1927. Eleven days after his death the present action was begun. The defendant, the wife, had acquired some interest in a relative's estate in Nebraska. The proceedings were begun by attachment of the wife's interest in this Nebraska property. The parties were, and still are, residents of Iowa. The defendant entered a general appearance.

The husband owed the plaintiff $7,731.30, unsecured, which was past due June 4, 1925. On that date, in consideration of an extension of time for payment, a new note and a mortgage on Smith's property were signed by both Smith and his wife. This note, when eleven months past due, May 3, 1927, was renewed by the husband and wife, in executing a new note and mortgage for the principal sum, due May 3, 1928, and, in addition, executing, for past due interest, two notes signed by both, one for $400, due June 1, 1927, and the other for $577.95, due August 1, 1927. At the time of the delivery of the renewal note and mortgage, interest on a first mortgage and taxes on the land were past due and delinquent. The interest, $378.15, the plaintiff, to protect its security, paid to the first mortgagee June 23, 1927. The delinquent taxes, aggregating $720.57, were paid by the plaintiff August 10, 1927.

At the time of filing the petition only the two interest notes were due, but the plaintiff claimed maturity of the principal note and immediate reimbursement of the other items by reason of an acceleration clause in the mortgage.

In her answer the defendant claims that she received no part of the consideration, signed the notes and mortgage merely as the wife of the original debtor and "for the sole and only purpose of waiving and releasing her contingent right of dower and homestead in and to the real estate aforesaid and in order that said contingent interests might be subjected to the satisfaction of said indebtedness in the event of the failure of her husband to pay the same," and generally denies the plaintiff's claims. In substance, the reply of the plaintiff is a general denial. The statutes of Iowa, pleaded by plaintiff, and the effect of which is admitted by the defendant, make her engagements as binding as if she were single. Code of Iowa 1924, sec. 10466; *Spafford v. Warren,* 47 Ia. 47; *Hinman v. Treinen,* 196 Ia. 701.

The pleadings and evidence show three defenses offered —want of consideration, immaturity of the principal debt, and nonliability by reason of the purpose for which the defendant's signature was needed and given.

That the defendant received valuable consideration for signing the notes and mortgage, under the conditions, is abundantly established by authority. It is settled law that a consideration is valid though it move to a third party. Restatement of the Law of Contracts by the American Law Institute, sec. 75 (2); 1 Williston, Contracts, sec. 113; *Violett v. Patton*, 5 Cranch (U. S.) 142; 13 C. J. 325. "Value is any consideration sufficient to support a simple contract. An antecedent or preexisting debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time." Comp. St. 1922, sec. 4636. The inquiry need be only whether the defendant's husband, the third party, received benefit. *Smith v. Spaulding*, 40 Neb. 339; *Buffalo County Nat. Bank v. Sharpe*, 40 Neb. 123; *Watts v. Gantt*, 42 Neb. 869; *Grand Island Banking Co. v. Wright*, 53 Neb. 574; *Wilson v. Neu*, 1 Neb. (Unof.) 42; *First State Bank of Herrick v. Conant*, 117 Neb. 562. And in Iowa, where the parties still reside and where the mortgage and notes were made, when the intention of the parties is that the wife should be personally bound when she joins her husband in a promissory note, extension of time for payment of the husband's debt is sufficient consideration to accomplish that object. *American Commercial & Savings Bank v. Kramer*, 206 Ia. 49; *Commercial Savings Bank v. Carey*, 207 Ia. 1060.

The petition shows, and the evidence more clearly establishes, that the causes claimed for accelerating maturity of the debt existed at the time the new notes and mortgage were taken. The taxes paid were for the larger part redemption of tax sales made December 6, 1926, the delinquent taxes of 1925, and the remainder the taxes for 1926, the latter, under Nebraska law, being delinquent May 1, 1927. Comp. St. 1922, sec. 6002. The presumption obtains, in the absence of proof, that the law of Iowa is the same as in Nebraska. *Haggin v. Haggin*, 35 Neb. 375; *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb. 374; *Chapman v. Brewer*, 43 Neb. 890; *Cook v. Chicago, R. I. & P. R. Co.*, 78 Neb. 64; *Twamley, Son & Co. v. Chicago, G. W. R. Co.*, 111 Neb. 311. All these delin-

quencies occurred during the time the former mortgage was in force, and information about which was available through records, or inquiry of defendant, at the time the present mortgage was taken. The delinquent interest due to the first mortgage must have been known to the plaintiff. Payment of other delinquent interest had been made by the plaintiff on three different occasions before the present notes were given. These are the causes claimed for acceleration. In view of the prior business relations of the parties and the circumstances, the intention of the parties must be construed to be that the causes for accelerating maturity must arise subsequent to the execution of the papers. If any doubt would exist as to this, the doubt must be resolved in favor of the defendant. The papers were prepared by the plaintiff; the defendant had no choice in the language used. *Flory v. Supreme Tribe of Ben Hur*, 98 Neb. 160; 4 Page, Contracts, sec. 2054. In considerating the mortgage alone, the clause, "if, however, any of these conditions are not complied with, or if there is found *hereafter* to exist any lien on said realty prior to this mortgage," must mean, in an interpretation most favorable to defendant, that the causes which would accelerate maturity of the obligation must not exist when, but must arise after, the mortgage is given.

The interest on the first mortgage and delinquent taxes, paid by the plaintiff, became charges in favor of the plaintiff and against the mortgagors by the terms of the mortgage. But for the mortgage the amounts so paid would constitute mere irrecoverable voluntary payments. A search of the mortgage fails to reveal any right of immediate reimbursement. Such payments became an additional obligation which the mortgage secured, a part of the original debt, and became due when the original debt would become due. The maturity of the original debt would ordinarily be accelerated under the terms of the mortgage upon the happening of the events we have detailed, but because of the circumstances do not, as we have found, constitute causes for acceleration. The principal debt is not due; and, the added obligation having lost its founda-

tion for maturity, the payments made cannot be recovered until the principal debt is due.

However, the question of immaturity should not arise, the plaintiff claims, since the defendant failed to take advantage of it by a plea in abatement. Most of the facts recited above are apparent from the pleadings, sufficient, at least, to raise doubt about maturity. Part of the plaintiff's proof is to establish a demand which has matured. *Kahn v. Cook,* 22 Ill. App. 559. "It is not a question of pleading by the defendant, but of proof by the plaintiff." *Wilder v. Colby,* 134 Mass. 377. A general denial, therefore, is sufficient to raise the issue. *Landis v. Morrissey,* 69 Cal. 83; *Nickerson v. Babcock,* 29 Ill. 497; *Bacon v. Schepflin,* 185 Ill. 122; *Franklin Savings Institution v. Reed,* 125 Mass. 365; *Smith v. Holmes,* 19 N. Y. 271; 1 C. J. 109, 110. This rule is particularly applicable when the defendant is a mere surety and the sole consideration to her is the time until maturity. In reaching a conclusion on this question we have not overlooked the many authorities to the contrary cited by plaintiff. The distinction, however, seems to rest in whether the matters are apparent from the face of the record or in whether the purpose is a mere dilatory one and not relating to the merits, or both. As to the latter the distinction is particularly well defined in *Bacon v. Schepflin, supra.* The defendant's answer, being in part a general denial, the question of immaturity is properly presented.

Cases are cited by the plaintiff holding that if the debt matures pending suit the plaintiff may proceed to judgment. The fallacy in these decisions lies in ignoring that the inquiry should be directed only to the right at the inception of the suit; that permitting a judgment notwithstanding original immaturity justifies a wrong as a matter of expediency, and carried to a logical conclusion would in all cases permit a creditor to anticipate default and have a judgment the moment a debt is due. So far reaching is such advantage to creditors that the legislature should definitely authorize such procedure before the courts should entertain it.

We come now to a consideration of the main defense offered—that no liability exists by reason of the purpose for which the plaintiff desired the signature of the wife. The trial court directed a verdict for plaintiff. So, in considering the evidence on this proposition, we must regard as conclusively established every point favorable to the defendant which the evidence tends to establish. *Vrbsky v. Arendt,* 119 Neb. 443. It is always proper to inquire into the consideration. *Kennedy v. Goodman,* 14 Neb. 585. And in order to have a proper concept of the defense offered it is necessary to review the facts relating to the origin of the debt. Prior to 1925 the husband owed a personal obligation for bank stock, the exact nature of which the record does not show, for which he had given his own note to the bank in the amount of the present principal sum. The husband was the owner of farm land. When this note was past due and considered for renewal, the cashier of the bank proposed, as he testifies, "that if Mr. and Mrs. Smith would give us a mortgage on this land we would extend the time." The notes involved in the present action are those taken on a second renewal. A new mortgage and new notes were executed. The defendant's evidence is that on execution of the papers the cashier said that the sole reason her signature was needed was to release her dower and homestead interest in the land; that it would never cause her "any personal trouble;" that she would not have signed the notes if a personal liability were to be assumed by her; that the reason the smaller notes were signed was, the cashier told her, the amount would otherwise be too large to pass the examiners. This evidence establishes the purpose for which the notes and mortgage were executed and delivered and comes clearly within the rule announced in *City Nat. Bank v. Dwyer,* 47 S. Dak. 567. The facts are almost identical. The court said: "It is contended by respondent that the testimony was incompetent because it tends to change or vary the terms of a written instrument. This contention is wholly without merit. There is no attempt to vary the terms of the note. The testimony was not admitted for that pur-

pose, but to show the purpose for which the note was given, to wit, that it was executed for the purpose only of waiving defendant's homestead right to the land described in the deed." See, also, *McCormick Harvesting Machine Co. v. Faulkner*, 7 S. Dak. 363, 58 Am. St. Rep. 839; *Ricords v. Mead*, 45 S. Dak. 617; *Dimock State Bank v. Boehnen*, 46 S. Dak. 50. The rule is based upon the negotiable instruments law. The statute in South Dakota is the same as ours, which provides: "The delivery may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the instrument." Comp. St. 1922, sec. 4627. Substantial distinction exists between the testimony in the instant case which tends to limit the application of a note as a note and that which tends to destroy it. The latter is uniformly held inadmissible and wanting as a defense. 20 A. L. R. 490. The former recognizes its validity, but limits the purpose for which the note may be used. A mortgage without a debt is valueless. No conveyance of a homestead without the wife's signature is lawful. Comp. St. 1922, sec. 2819. Thus the wife's signature on the mortgage is essential to obtain valid security; her signature on a note is necessary to ultimately realize the amount out of the security thus obtained. It is for this purpose that the note is needed and delivered; and testimony to show these facts comes clearly within the permission of the negotiable instruments law quoted. Moreover, the nature of the testimony has such strength, in probability and belief, that additional justification for its admission may be found on that ground.

It will be observed, therefore, that whether the statements claimed by the defendant to have been made to her as the inducing cause for her signature were actually made is a question of fact for the jury, and upon the determination of this fact depends the right of the plaintiff to recover on any of the items mentioned; that suit has been prematurely brought on the principal note and the other items except the short-term notes.

The plaintiff's petition is divided into two causes of ac-

tion, the first declaring on the short-term notes which are due; the second declaring on the principal note and the other items.

From all the foregoing, it is decided that the question of fact with respect to the first cause of action should be submitted to the jury; and that the second cause of action should be dismissed without prejudice to another action.

Reversed, with directions to dismiss the second cause of action without prejudice.

REVERSED.

NATIONAL MORTGAGE LOAN COMPANY, APPELLANT, V. ERNEST G. HURST ET AL., APPELLEES.

FILED JULY 1, 1930. No. 27001.

1. **Equity.** "Equity seeks the real and substantial rights of the parties, and applies the remedy in such manner as to relieve those having the controlling equities." *Weckerly v. Taylor*, 77 Neb. 886.
2. **Corporations: FRAUD: EQUITY.** "A court of equity will not permit mere corporate forms to serve as a cloak and a shield to the perpetration of a fraud, but will examine the whole transaction, looking through corporate forms to the substance of things, to protect the rights of innocent parties, or to circumvent fraud." *Ehlers v. Bankers Fire Ins. Co.*, 108 Neb. 756.

APPEAL from the district court for Saunders county: HARRY D. LANDIS, JUDGE. *Remanded, with directions.*

Hartigan & Fouts, for appellant.

Mullen & Morrissey and *J. H. Barry, contra.*

Heard before GOSS, C. J., ROSE, DEAN, THOMPSON, EBERLY and DAY, JJ., and FITZGERALD, District Judge.

FITZGERALD, District Judge.

This is an action by the National Mortgage Loan Company, appellant, to foreclose two mortgages on a farm in Saunders county, Nebraska.

The petition sets out the mortgages and the history of the mortgages and notes coming into the hands of plaintiff,

through succession of plaintiff to the rights in notes and a mortgage dated September 1, 1922, on which it is now claimed there is due $17,447, and by assignment of notes and a mortgage of same date, by one W. S. Collett, the mortgagee, on which it is now claimed there is due the sum of $14,584.

Defendants' answer reveals that the notes and mortgages were made substantially as alleged, but they contend that these notes and mortgages were based on fraud, and pray for an accounting of the payments made by defendants in the transaction and for judgment in whatever amount is found to be due, together with the cancelation of the notes and mortgages.

The entire record discloses that Bankers Automobile Insurance Company and Bankers Fire Insurance Company were organized under the laws of the state of Nebraska. It also discloses that both concerns were manned by substantially the same crew, though the positions of the men were somewhat different in the two concerns. Both companies used the same offices.

Plaintiff herein is the successor to Bankers Fire Insurance Company. The Bankers Automobile Insurance Company was taken over by the state department of trade and commerce.

The consideration for the notes and mortgages before us was purchase money for stock in both of the above concerns during the year 1918 and spring of 1919. In addition to this stock in the two companies there was a $3,000 mortgage on defendants' farm. This mortgage was taken up and paid, apparently by plaintiff's predecessors, to clear the title of the farm for their mortgage, and this amount was added to the original mortgage out of which this action arises. The testimony is that the $3,000 mortgage had been reduced by payments to $2,000 or $2,500, but leaves us there to conjecture.

Plaintiff's counsel in his brief and in his oral argument is not strenuous in urging the good faith of sale of stock in the Bankers Automobile Insurance Company, but is vigorous in his claim that the Bankers Fire Insurance Com-

pany was free from wrongful conduct. We are unable to distinguish between the methods used by the two concerns. True, it was not the same salesman who persuaded defendants to purchase the stock in the two concerns, but they were from the same office and were sent out by the same men, and their methods of salesmanship and persuasion were practically identical. In addition to this, both concerns operated at defendants' home through one Emil Benson, a banker at Wahoo, who took care of defendants' paper. The undisputed testimony is that defendant Ernest G. Hurst gave checks aggregating many thousand dollars when there was no money in the bank nor any funds available or in sight to meet them, and still Benson and the salesman, in each instance, delivered the stock and months afterwards arranged the notes and mortgages. There was originally one mortgage, which was split solely for negotiation convenience. We are driven to conclude that the transactions between defendants and the automobile insurance company and between defendants and the fire insurance company were one continuous transaction and all grounded in fraud. Equity will not allow corporate forms to serve as a cloak under which to perpetrate fraud, but will examine the whole transaction.

This court has already held that the same methods employed in the sale of the stock were fraudulent, in cases where the evidence was identical with that disclosed in this record, and we find it unnecessary to repeat it. Therefore, we must conclude that the trial court properly denied the decree of foreclosure.

We further hold that the doctrine of estoppel is not available to plaintiff. It is conclusively manifested by the record that defendant Ernest G. Hurst's participation in the Scow litigation was not his act, but was the act of plaintiff herein or its predecessor, and there is no justification for a holding that plaintiff is not bound by its predecessor's conduct in this matter. "Equity seeks the real and substantial rights of the parties, and applies the remedy in such manner as to relieve those having the controlling equities." *Weckerly v. Taylor*, 77 Neb. 886.

We are not satisfied with the testimony on the amounts paid by defendants in money and bonds, nor the testimony as to the extent of the mortgage on defendants' farm at the beginning of their dealings in this stock, but we assume that counsel on both sides have done their best with the material at their disposal. It appears that the amount paid by defendants would approximately balance the mortgage, and we hold that it does balance and satisfy the same; and we affirm the decision of the trial court as to the equities of the parties, but direct the trial court to cancel the notes and mortgages and to enter a decree quieting the title to the land in controversy in defendants, at plaintiff's cost.

The certificates of stock are either already at plaintiff's disposal or are in the records of this case and may and should be turned over to plaintiff.

The cause is remanded to the trial court, with directions to enter a decree according to this opinion.

REMANDED, WITH DIRECTIONS.

ERMA WILLIAMSON, APPELLEE, V. EMMA WILLIAMSON ET AL., APPELLANTS.

FILED JULY 1, 1930. No. 27167.

1. **Jurisdiction**: APPEARANCE. A party may raise the question of jurisdiction over his person for the first time in his answer. If instead of answering he files a motion attacking the petition, he thereby waives the question of jurisdiction over his person.
2. **Husband and Wife**: ALIENATION OF AFFECTIONS: MALICE: BURDEN OF PROOF. In an alienation suit by the wife against the parents of the husband, the burden is on the wife to establish by a preponderance of the evidence malice of the parents.
3. ———: PARENTS: ADVICE: PRESUMPTION. The law presumes that the father and mother, in advising their child, acted in good faith and for what they supposed to be his best interests.
4. **Evidence** examined and *held* to be insufficient to sustain a verdict in favor of the plaintiff.

APPEAL from the district court for Lancaster county: ELWOOD B. CHAPPELL, JUDGE. *Reversed.*

Good, Richardson & Good and *E. S. Schiefelbein,* for appellants.

Roy B. Ford and *W. B. Comstock, contra.*

Heard before GOSS, C. J., ROSE, DEAN, THOMPSON, EBERLY and DAY, JJ., and LIGHTNER, District Judge.

LIGHTNER, District Judge.

This is a suit by Mrs. Erma Williamson, wife of Alva Williamson, against his parents for alienating his affections. The jury found in plaintiff's favor in the sum of $7,500 and the defendants bring the case to this court on appeal.

Defendants present two main grounds for reversal: First, that the district court erred in striking from their answers their pleas to the jurisdiction; and, second, that the evidence is not sufficient to sustain the verdict.

Defendants separately plead that they were induced to come into Lancaster county by the fraud and trickery of the plaintiff who there secured service of summons upon them. However, the defendants did not raise this question when they were first called upon to answer, but they each filed a motion asking that the petition be made more definite and to strike. It is a well-established rule in Nebraska that by filing such motion the defendants submitted themselves to the jurisdiction of the court and waived any irregularity or defect in obtaining jurisdiction over them. *Bankers Life Ins. Co. v. Robbins,* 59 Neb. 170, and *Lillie v. Modern Woodmen of America,* 89 Neb. 1. This rule is in conformity with good judgment, for naturally it would be useless for the court in Lancaster county to spend its time examining the petition persuant to defendants' motion if the court did not have jurisdiction over the persons of the defendants. To the same effect see *Linton v. Heye,* 69 Neb. 450; *Hurlburt v. Palmer,* 39 Neb. 158; *Kyd v. Exchange Bank of Cortland,* 56 Neb. 557; *Baker v. Union Stock Yards Nat. Bank,* 63 Neb. 801; and *Gaines v. Warrick,* 113 Neb. 235. Defendants insist that our court has held that the filing of a preliminary motion or demurrer does not waive the objection, and there

appears to be some support for this contention in the case of *Kyd v. Exchange Bank of Cortland, supra.* In that case the defendant filed a demurrer based evidently on the want of jurisdiction which must have appeared on the face of the petition. The court sustained the demurrer. Later the plaintiff amended his petition and the defendant then successfully raised the question of jurisdiction in his answer. That the case above referred to does not rule the instant case will appear from the syllabus wherein it is said that, if the defect be one of jurisdiction of the person, it is not waived by demurring to the original petition generally, if such demurrer is sustained for the reason stated in the order, that the court is without jurisdiction, and where the plaintiff waives any error in that order by amending his petition.

We will next examine defendants' claim that the evidence is insufficient to support the verdict. Defendants claim that the evidence does not show that they alienated their son's affections from plaintiff, or if their acts and advice could by any construction be held to have produced that result that nevertheless they were not actuated by malice but by good motives in all that they did and said. The writer has carefully read the pleadings and read and abstracted the bill of exceptions consisting of over 280 pages and believes that the record is entirely deficient in proof to support a verdict for the plaintiff.

The facts in this case are substantially as follows: The plaintiff and Alva Williamson, son of the defendants, were married at the plaintiff's home in Lennox, Iowa, on July 4, 1927. Plaintiff was then 20 years old and Alva was 21. Alva's parents lived in Lincoln at that time and both plaintiff and Alva were attending the Lincoln School of Commerce. The young couple first met in 1926. Alva brought plaintiff to his home and introduced her to his family in February, 1927, and about two weeks before the marriage she came to live with the defendants, and on July 5, after returning from the marriage, she continued to live with them until about August 1, 1927, when the young couple moved to Stapleton, Nebraska, where Alva was employed

in a lumber yard. He lost his position about December 1, 1927, and on invitation from the defendants the young couple again made their home with the defendants, except for visits, and part of the time Alva was employed at a distance. Plaintiff, however, continued to live with them until about May, 1928, when she finally left, or, as she claims, was forced to leave, since which time she has been living in Lincoln. The defendants moved from Lincoln to Ithaca about March 1, 1928, and the plaintiff accompanied them. There was no quarreling between plaintiff and defendants, no open hostility of any kind, and so far as the record shows the defendants were not aware of the fact that anything they ever said injured the feelings of the plaintiff, but the plaintiff says that on several occasions the defendant father-in-law made remarks which deeply wounded her feelings. She claims that on one occasion when her husband was working at Palmer and she was looking for a letter from him and asked her father-in-law if one had come, he said: "No. He has probably got another girl out at Palmer anyway. He isn't so foolish as he used to be. When I was first married I used to be foolish too, but I got over that." And at another time while her husband was in Wood River her father-in-law said: "He isn't foolish any more like he used to be." The defendant Elmer Williamson denies making these statements. If he made them they undoubtedly show a lack of delicacy on his part, but plaintiff says herself that she did not cry or show her feelings before her parents-in-law and there is nothing in these statements made in the absence of the husband, and in so far as the record shows not communicated to him, which would have any tendency to alienate his affections.

Plaintiff accuses the defendants of advising a separation without legal justification. Alva testified that once in April, 1928, when his father was wanting him to move out on his farm the following spring, he said: " 'If there is any trouble between you'—now, he didn't know that there was and I didn't tell him that there was. * * * 'If you are going to separate, the quicker you quit, the better. There is no children to suffer by the separation now, and if that is

what it is coming to, the quicker the better.' " The evidence however shows conclusively that there had been trouble between the young couple prior to this time. The father-in-law's version of the matter is that on the day in question, April 27, 1928, he had a talk with his son about going out on his farm, and the son told him that he and his wife had been wrangling all the way from Palmer home and said: "I am leaving here, * * * I flatly refuse to live with her." And then the father said, "If that is the way you feel about it, don't bring any children in this world that have to suffer along with the rest of us," and that was the only time he ever said anything about separation. This conversation, as related by the son, has a tendency to support plaintiff's contentions, but even the son's account indicates that the father believed that they were having trouble, a fact that could scarcely escape his notice since they were all living under the same roof, and the advice given under such belief cannot be said to have been malicious.

Plaintiff complains that defendants by their advice prevented the young couple from going to California where Alva could obtain work, but the record is clear that no job in California had actually been offered to him. The question of going to California came up in the winter on receipt by plaintiff of a letter from a relative, a demonstrator for aluminum ware, suggesting that the young husband might find work there, but not actually offering him a job. They had $75 or $100 and intended to make the trip by automobile. Mr. Williamson, Sr., simply intimated that it would be unwise to undertake the trip at that time of the year with so little money and no job assured. Plaintiff also complains that the mother-in-law prevented Alva from taking a job in an apartment house in Lincoln, and claims her mother-in-law said in effect that such a job was below his education and station in life, but the record shows quite conclusively that he was the second applicant for the job and intended to take it, but when he came back to further see about it, it had already been given to the first applicant.

Plaintiff refers to various acts of keeping her and her husband apart. She says her mother-in-law and husband

went to a funeral without inviting her to go with them, but the record shows that she was not acquainted with the deceased and did not expect to live in that neighborhood. Defendants claim that she was offered the opportunity to go and declined. In any event this instance adds nothing to plaintiff's claim that the affections of her husband were alienated. Some of the other occasions complained of were when the young husband took his mother to Ceresco to see her mother who was and for some time had been bedfast. It was a simple act of filial duty for the son to take his mother on these trips. There is no proof that the mother said anything to the son on these trips to influence him against his wife and the trips, so far as the record shows, were not for the pleasure of the son nor for the purpose of being away from his wife, but pursuant to a well-understood duty. She complains because on one occasion the son went to a wedding anniversary party without inviting her to accompany him. This was a few days before March 1, 1928, and while the Williamsons were preparing a house in Ithaca for occupancy. The mother and son usually went up during the day and returned at night. There was some talk between plaintiff and her husband about going to this party. Before leaving for Ithaca that morning the son told his wife that he had decided not to go, but later he decided to go and plaintiff was left home alone. There is no proof that the mother influenced him to go. Plaintiff also complains because she was left in Lincoln and not taken to Ithaca to help with this work. The record does not show any sinister purpose in leaving her in Lincoln, but shows that she was left there to take care of a young son of the Williamsons, a child six years of age, who otherwise would have been left alone for several hours. There is nothing in any of these incidents to indicate an intention on the part of the parents to separate the young couple. She says that defendants gave plaintiff to understand that their son was foolish in getting married and would never get anywhere with a wife on his hands. Such remarks, if made, in light of the whole record, were nothing more than criticism on the young couple for having married so young.

One of her principal complaints is that defendant, Mrs. Williamson, Sr., at one time, apparently early in April, 1928, interrupted intercourse between the young couple in such manner that it was never reestablished. Even if the disastrous consequences claimed by plaintiff followed from the alleged interruption, the record is quite clear that it was accidental and unintentional. If more than one act had been complained of, some design of the mother-in-law might be deduced, but for the mother-in-law to step into the bedroom occupied by the young couple early in the evening would not be so unusual. Besides, they could have locked or barred their bedroom door, and it would seem that the love of the husband had already become tenuous in the extreme if this one accidental interruption by his mother resulted in the entire cessation of the marital relation between the young couple. Furthermore, both the mother-in-law and the son say that the mother-in-law knocked on the door and was given permission to enter before entering. Plaintiff says that during the last meal she ate at defendants' home the family refused to pass her things at the table and refused to talk to her. If this happened, which is denied, it was long after plaintiff herself claims that her husband's affections were completely alienated.

Acting coolly toward the plaintiff and hardly talking to her in the presence of her guests: Plaintiff simply testified to the conclusion that on Easter Sunday when she had some guests her mother-in-law treated her coolly or coldly. We are left in the dark as to exactly what she did. On this particular Sunday Mr. Williamson, Sr., and daughter Vera were both sick. Nevertheless, the mother-in-law was willing to have in the outside guests. There is nothing substantial in this contention to support a verdict.

Speaking contemptuously of her in the presence of her husband in making reference to what a Williamson woman would do under the same circumstances: This remark was used in discussing plaintiff's wish to work in an office and was to the effect that the place for a Williamson woman was in the home, and that a woman couldn't work seven or eight or nine hours a day in an office and also do the house-

work. The record does not show that plaintiff was referred to contemptuously, but she was asked to occupy the status of a Williamson woman. This would indicate, not a wish to separate plaintiff from her husband, but to make her an integral part of the Williamson family. While plaintiff may be right in her contention that this advice prevented her from obtaining a job so that a separate home could be maintained and had a tendency to bring about the loss of her husband's affections, its purpose and design appear to have been just the opposite.

She complains that defendants went to Wood River immediately after receipt of her letter saying she was going to Wood River, and did something there which dissipated any affection that their son bore for the plaintiff. There is no evidence to indicate what conversation the defendants had with their son when they visited him at Wood River. Plaintiff testified that she received a letter from Alva after such trip stating that his parents had talked it over with him and that he was through with her; that he didn't know if he would ever come to see her again and for her not to dare to come out to see him. Such evidence is hearsay as to defendants. Shortly before defendants visited their son at Wood River plaintiff also visited him there, and on her return wrote to her mother-in-law stating that she had had a nice time with her husband on the trip, and said further: "Dear Mother: * * * I surely do miss you folks. * * * Whenever you come to Lincoln be sure and come in to see where I work. I surely would be glad to hear from you. As ever, Erma." Plaintiff testified that once, when Alva was leaving, his mother said: "It is just impossible for me to give my son up." Mrs. Williamson, Sr., denies making the remark. At most, it was only an expression of her attachment for her son.

The above states substantially the complaints of plaintiff, although other incidents of a similar nature are related by her, none of which however would have the effect of alienating the husband's affections or were designed for that purpose. The record as a whole shows that the defendants had a liking for plaintiff and she for them; that they never

intentionally interferred in their marital relation, but did give advice and offer suggestions in regard to their business affairs. Plaintiff testified to a number of remarks made by her husband to her in the absence of defendants, such as that his parents had not wanted him to get married and now they would have to make good; that his father told him he didn't want them to have children right away, and so forth. Defendants denied giving such advice to the son, and such statements are admissible, not to show the facts, but only to show the state of mind of the husband, to show a cooling of his love through the influence of defendants.

There is no doubt that the young husband's love for his wife waned and it was perhaps natural for plaintiff to lay the blame on her parents-in-law. It is not the first time in which apparently warm and enduring affection scarcely outlived the honeymoon. It is scarcely possible from the record to surmise the real reason for the coldness that grew up between this young husband and wife and lead thus early to the tragedy of a separation between them. Defendants hint that the real trouble was that plaintiff wanted to live in a big city and was not willing to undergo the drab and colorless existence of life in a small town where the duties of her husband would take her. Part of the trouble of course between the young couple must be ascribed to the fact that the financial condition of the husband was such that they had to make their home with his parents. It was an unsatisfactory arrangement, but the defendants were not to blame. They did the best possible under the circumstances and offered their home as an asylum where the young couple could come in from their misfortunes and find a home and rest.

The authorities, we believe, fully sustain these conclusions. In the cases of *Hope v. Twarling*, 111 Neb. 793, and *Stocker v. Stocker*, 112 Neb. 565, are statements of facts held by the court to justify a recovery by plaintiff. While it is not intimated in the opinions that facts less strong might not justify and support a recovery, it must be admitted that the facts in these two cases were very much stronger than in the present case.

"The law presumes that the father and mother, in advising their minor child, acted in good faith and for what they supposed his best interest." *Melcher v. Melcher,* 102 Neb. 790.

"There is a well-defined distinction between the privileges accorded to parents and guardians in their communications with children and wards, with reference to their domestic relations, and that which exists between strangers.

"Where advice is given by a guardian, which leads to a separation by the ward from husband or wife, the presumption is that the advice was given in good faith." *Trumbull v. Trumbull,* 71 Neb. 186.

On the other hand, "if a parent breaks up, or assists in breaking up, a valid marriage, * * * solely 'because he is displeased with the marriage, or because it is against his will, or because he wishes the marriage relation to continue no longer,' he will be liable in damages to the party injured." *Melcher v. Melcher, supra.*

In an alienation suit by the wife against the husband's parents, the existence of malice must be affirmatively proved, for a parent who advises his son or daughter to leave the marital home is presumed to have done so out of parental affection and solicitude for the welfare of the child, and he cannot be held liable unless the plaintiff, who has the burden of proof, establishes that his advice or conduct is actuated by malicious motives. *Sowle v. Sowle,* 115 Neb. 795. It is true that it is said in the opinion in *Melcher v. Melcher, supra*: "It is unlawful to attempt to separate husband and wife, or to annul or dissolve the marriage relation between them, unless some statutory ground for annulment or divorce exists. If such ground exists, or the circumstances are such as would lead a reasonable mind to believe that it does exist, the parent who, in good faith, believes that the ground exists, may advise as he honestly believes is in the interest of his son." The part of the syllabus with reference to this point is not so broad; the fourth paragraph of the syllabus in *Melcher v. Melcher* being: "A parent may advise his son in good faith to leave

his wife or to procure a divorce, if statutory grounds for separation and divorce exist or he has reasonable cause to believe and does believe that such grounds exist." Both the quotations from the opinion and the syllabus must be considered, however, with reference to the facts in that case, which were that the son's parents, for some reasons of their own, because of religious differences, or differences in financial conditions, or matters of education, determined that the marriage should be annulled without regard to the feelings of the parties most concerned and without regard as to whether legal grounds for separation did or did not exist. We think the most that can be said for appellee's contentions that malice may be presumed in this case is that, if the husband's or wife's parents are instrumental in breaking up a marriage under such circumstances as are set forth in *Melcher v. Melcher*, and where no legal grounds for separation exist or the circumstances are not such as would lead a reasonable mind to believe that they do exist, the jury may infer or presume malice from such acts on the part of the parents. The burden would still be on the plaintiff to show malice, but the jury would be authorized to infer it from such wanton and unjustifiable conduct. But no wanton or unjustifiable conduct sufficient to alienate the son's affections have been shown in this case.

In *Beisel v. Gerlach*, 221 Pa. St. 232, 18 L. R. A. n. s. 516, the Pennsylvania court say: "The law recognizes the right of a father to advise his daughter about her domestic affairs without incurring liability for alienation, if the advice be given in good faith and prompted by worthy motives, even if such advice influenced the daughter in making up her mind to separate from her husband. In other words, there can be no recovery against the father unless it clearly appears that he acted maliciously, without justification, and from unworthy motives." In *Busenbark v. Busenbark*, 150 Ia. 7, the court say: "The law is tender of the parental relationship. The parent has the liberty of extreme solicitude for the welfare of the child even after marriage, and may advise freely and frequently and even foolishly. His good faith will be presumed until the contrary is made

to appear." See, also, *Larsen v. Larsen*, 115 Neb. 601, and *Sohl v. Sohl*, 114 Neb. 353.

For the reason that the evidence is insufficient to support the verdict, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

ROSE and DAY, JJ., dissent.

NETTIE L. GERISH, APPELLEE, V. MORRIS P. HINCHEY, APPELLANT.

FILED JULY 1, 1930. No. 27195.

1. Negligence: TRIAL: INSTRUCTIONS. An instruction which places the burden of proof upon the wrong party and which misstates the law as to contributory negligence is erroneous.
2. Witnesses: COMPETENCY: SPEED OF AUTOMOBILE. A witness otherwise qualified is not incompetent to estimate the speed of an automobile solely from the fact that it is approaching him directly.
3. Appeal: MISCONDUCT OF COUNSEL. Misconduct of counsel in arguing a case to the jury in order to be available to the complaining party as error on appeal must ordinarily be objected to at the time it occurs.
4. ———: DISQUALIFICATION OF JUROR. The court will not reverse the judgment because of disqualification of one of the jurymen, if it appears from the record that appropriate questions on the part of complaining counsel would have developed such disqualification, but they were not asked.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Reversed.*

Crofoot, Fraser, Connolly & Stryker and *James T. English*, for appellant.

Benjamin S. Baker and *Ralph T. Wilson, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and LIGHTNER, District Judge.

LIGHTNER, District Judge.

This is a suit by Dr. Nettie L. Gerish against the defendant, Morris P. Hinchey, on account of an accident

which happened on April 3, 1928, at the intersection of Eighteenth and Binney streets in the city of Omaha. Mrs. Gerish recovered a judgment for $15,000 and defendant brings the case to this court by appeal. Mrs. Gerish was driving south at the time of the accident and claims that it was her intention to continue on south straight through the intersection to Farnam street. The driver of defendant's truck or laundry wagon was driving west and claims that it was his intention to continue on west, as his next stop was several blocks west of the intersection on the same street. Both Mrs. Gerish and the driver of the truck claim that he or she saw the other automobile when it was back several car lengths from the crossing; and each claims that he or she got into the intersection first. It was a clear morning and the accident happened at about 10:30 o'clock in the morning. Mrs. Gerish's version of the accident is that, after she observed the truck and saw that it was several car lengths from the intersection, she proceeded into the intersection and had got nearly through the same when she heard the noise of brakes being applied and looked back and saw the truck coming toward her and that it almost instantly struck her. The truck driver's version of the accident is that he reached the intersection first and that Mrs. Gerish cut in ahead of him and turned west, that he swerved his car to the left to go around her, and that she immediately turned south directly in front of his truck; that he also attempted to turn, but that it was too late to avoid a collision. The collision seems to have occurred on the southwest corner of the intersection and both vehicles were at the southwest corner of the intersection after the accident. Mrs. Gerish's Ford sedan was within a foot or two of the curb where it was rounded off at the southwest corner of the intersection and the truck, which had struck it at about the front door, was still against the sedan after the collision.

The parties also disagree as to the effects of the collision. Mrs. Gerish claims that the impact was so great that she was thrown from the driver's seat on the left side of her sedan through the right-hand door and out onto the pave-

ment or curb. And Mrs. Brown, who lives in the fourth house west of the intersection on the south side of the street, testified that she saw her getting up from the pavement and get back into her automobile. On the other hand, the driver of the truck, the neighbors who lived in the first, second and third houses west of the intersection, the neighbor who lived in the house east of the intersection, and a man who was painting the house east of the intersection, and who was on a scaffold about fifteen feet above the ground where he had an unobstructed view, claim that Mrs. Gerish was not thrown out of her automobile but remained sitting at the driver's seat after the collision.

The witnesses also disagree as to the distance the Ford sedan was pushed by the impact of the collision, one side claiming that the back wheels were skidded sideways not more than a foot or two, and the other side claims that the back wheels were pushed sideways 15 or 16 feet.

It seems to be agreed, however, by all parties that Mrs. Gerish got out of the automobile directly after the accident and spent perhaps an hour or more measuring and going over the ground at the scene of the accident, and then walked home, a distance of two or three blocks. Most of the witnesses who saw her at that time claim they did not see any blood on her or other indications of injuries and thought that she was not hurt. It is conceded that Mrs. Gerish called Dr. Dunn on the day of the accident and Dr. Henry within two or three days afterwards and that she entered Lord Lister hospital on April 9, 1928, and remained in the hospital until the 12th of May, 1928.

The conflict in the medical evidence is even more marked, if possible, than the accounts of the accident. One group of doctors, among them some of the most eminent in Omaha, testified that Mrs. Gerish's injuries were severe and permanent. And she herself claims that she suffered injuries to the sacroiliac region of her back and to her limb which have completely disqualified her from following her profession. She claimed a 50 per cent. degree of deafness from the accident, and one of the doctors in describing her stated that her face was that of a cripple. On the other

hand, another group of doctors, also including some of the most eminent in Omaha, testified that her injuries were slight in the extreme; that many of the various injuries she claims could not have resulted, even though she had been thrown out on the pavement, as she claims, and they accuse her of malingering.

The bill of exceptions contains 680 pages and the author of this opinion has read it with great care and made an abstract of the testimony. It would unnecessarily extend this opinion to give the evidence in detail and we have only stated it sufficiently to indicate the sharp conflict.

Defendant claims various errors, and in view of the sharp conflict in the evidence it would seem that, if any important mistake of law was made, or if counsel abused their privileges in argument, a new trial would have to be ordered.

One of the errors claimed was the court's instructions to disregard the evidence of the witness Peter D. Larr as to the speed of Mrs. Gerish's car as it approached and entered the intersection. Mr. Larr is the painter who was on a scaffold 15 feet from the ground painting the G. J. Hatz house on the southeast corner of the intersection. He claims that he had just moved his scaffold from another location and had just climbed up to this position when he noticed the Gerish automobile approaching at a rapid rate of speed; that he noticed its speed on account of the presence of several small children on the street, and that he continued to watch the automobile until the time of the collision. And, being asked to estimate its speed, he said that he thought it was traveling at the rate of 25 or 30 miles an hour as it approached the intersection. He qualified himself as one capable of estimating the speed of an automobile. The district court was of the opinion, however, at the time of the trial, that our supreme court had held that one could not testify as to his estimate of speed of an automobile coming directly toward him. Mr. Larr's exact position seems to have been about 50 feet south of Binney street where he stood on the scaffold 15 feet up from the ground and at least 35 feet east of the center of Eighteenth

street. Therefore, the automobile was not coming directly toward him but a little to one side. Furthermore, it is not the law that one cannot estimate the speed of an automobile coming directly toward him, but he should be permitted to give his estimate, and the weight of his testimony is for the jury. The district court, after the admission of this evidence, orally instructed the jury to disregard Mr. Larr's estimate of speed, and gave a written instruction to the same effect. The oral instruction to disregard the answer of the witness Larr upon that point and the subsequent written instruction was error on the part of the district court. *Pierce v. Lincoln Traction Co.*, 92 Neb. 797; *Andersen v. Omaha & C. B. Street R. Co.*, 116 Neb. 487.

Counsel for plaintiff claim, however, that such action of the court, even if erroneous, was not prejudical, in that the testimony of Mr. Larr as to speed was not material. They contend that the defendant did not claim that the accident was due to excessive speed by Mrs. Gerish but to the fact that she turned to the south after first turning to the west, and that such turn, and not her rate of speed, caused the accident. The answer to this is that all of the parties at the trial, including the court, considered the rate of speed of her car to be a material matter. Furthermore, defendant pleads that plaintiff did not have her automobile under proper control as she entered the intersection, and that would include the element of speed. An examination and consideration of the entire record indicates that the rate of speed with which the two cars approached and entered the intersection was a material and important consideration and in our judgment Mr. Larr was in the best position of any one outside of the parties themselves to estimate the rate of speed at which Mrs. Gerish was traveling.

Defendant also complains on account of the giving of instruction No. 9 of the instructions given by the court to the jury on its own motion. Said instruction is as follows:

"As heretofore stated, defendant not only denies that he was negligent in any respect whatsoever, but alleges that it was the fault and negligence of plaintiff herself that was the direct cause of the accident and injury to her and

her car. The defendant having thus alleged negligence on the part of plaintiff, the burden of proof is upon him to establish the same by a preponderance of the evidence before he can prevail in said defense. In this behalf, you are instructed that, should you find from a preponderance of the evidence that the plaintiff herself was negligent in the driving and operation of her car immediately before and at the time of the collision which happened, and that such negligence was the sole proximate cause of the accident and injury to herself, then plaintiff cannot recover at all in this case and in that event your verdict should be for the defendant."

A similar instruction was held to be erroneous in the case of *Davenport v. Intermountain R., L. & P. Co.*, 108 Neb. 387. See, also, *Gibson v. Kelkenny*, 112 Neb. 524. It certainly was not the duty of the defendant to establish that it was the fault and negligence of the plaintiff that was the direct cause of the accident and injury to her and her car before he could prevail in his defense. The burden of proof to establish negligence was on the plaintiff, and if she failed to establish negligence on the part of the defendant she could not recover, and even if she was guilty of contributory negligence she could not recover unless her contributory negligence was slight and the defendant's gross in comparison therewith. Yet the court casts this burden upon the defendant, and while the court in instructions Nos. 2 and 3 lays down the correct rule, and in instruction No. 10 states the correct rule as to contributory negligence, the error in instruction No. 9 is sufficient to confuse the jury and it is impossible to tell which rule they attempted to follow. The error in instruction No. 9 is sufficient to require a reversal of the case.

Defendant also complains of the arguments and claims that the fact that defendant carried liability insurance was brought into too great prominence. It seems to us that this criticism is also well taken. If this were the only error complained of, we would hesitate to reverse the case, since the record does not show that objections were made to the argument at the time, and it is claimed that counsel for

defendant invited the error by first introducing the subject of insurance. Nevertheless, plaintiff's counsel dwelt too much on the part they claimed the insurance companies were taking in the trial, and it is one of the things that prevented the defendant from having a fair trial.

Complaint is also made in regard to the juror William A. Lamson. It seems that Mr. Lamson had a son 13 years of age who 11 years before had sustained, by falling down a flight of stairs, injuries similar to those Mrs. Gerish claims she was suffering from. Mr. Lamson was so impressed with the long suffering and crippled condition of his own son that he states in an affidavit made after the trial that "he had observed his own son's foot for many years, knew of the efforts that had been made to remedy his condition, and, due to his own experience and his observation of plaintiff's foot, he came to the conclusion at the time he saw same that her complaint concerning her leg and foot was true, and that her crippled condition was permanent; that, on account of the intimate knowledge gained through his own peculiar experience, he would have remained of this opinion regardless of the medical testimony on either side of the case." Mr. Lamson discussed the condition of his son before the jury. He was first in favor of giving plaintiff the full $50,000 she asked for and on the final ballot he voted for $25,000 and refused to join in the $15,000 verdict. We would hesitate to reverse the case on account of the evident disqualification of the juror Lamson, because the record indicates that he was an honest juryman and would have disclosed the state of his mind if he had been sufficiently questioned. It did not occur to him from the general questions and from seeing the plaintiff in the courtroom that a case so similar to that of his son would be developed. In failing to bring this out when they had the opportunity, defendant waived the objection. But the fact that Mr. Lamson was unfair and prejudiced is also another factor which prevented the defendant from having a fair trial.

Defendant also complains of unfairness and misconduct on the part of plaintiff. He points out that she testified

that her earnings in 1927 and in 1928, immediately prior to the accident, were in the neighborhood of $700 to $800 or $900 a month. On being forced to bring in her income tax returns, it developed that they were far less than that amount, a net income for both herself and her husband of not over $2,500.

During the trial an attempt was made to get the records pertaining to her case while she was in the Lord Lister hospital. This effort was made in the presence of plaintiff and her husband, and it appeared from the evidence of Dr. Henry and some employees at the hospital that they were probably lost. It developed after the trial was over, by an affidavit from Mrs. Henry, the manager of the hospital, that these records had been turned over to Mr. Gerish at the request of himself and the plaintiff some time before, and that they had sent them to an insurance company. Therefore, it would seem that Mr. and Mrs. Gerish knew where they were during the time that this effort was being made to secure them. It also appears from an affidavit made since the trial that Mrs. Gerish had gone through the Mayo Clinic at Rochester, Minnesota, in June, 1928, which fact she failed to disclose when questioned on the witness-stand about doctors who had attended her. The mind of a party does not always function clearly during the excitement of a trial and these may simply have been omissions and oversights of plaintiff, and not of sufficient importance to work a reversal, but nevertheless adding to the impression that the trial was not fair.

It appears from an examination of the record that defendant did not have a fair trial and therefore the judgment is reversed and the cause remanded.

REVERSED.

JOHN HUNTER V. STATE OF NEBRASKA.

FILED JULY 1, 1930. No. 26898.

Criminal Law: CONTINUANCE: MOTION TO DISCHARGE JURY. Overruling objection to proceeding with trial in criminal case after an adjournment of 19 days occasioned by the accidental injury of

the defendant is not erroneous, where the record does not show misconduct on the part of any juror or prejudice to the defendant.

ERROR to the district court for McPherson county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

William E. Sherman, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Homer L. Kyle, contra.*

Heard before GOSS, C. J., DEAN, EBERLY and DAY, JJ., and RHOADES, SPEAR and TEWELL, District Judges.

RHOADES, District Judge.

The defendant was convicted upon a charge of unlawful possession of mash and material which he was using in the manufacture of intoxicating liquor. The assignment of error most seriously argued before the court and discussed most in the briefs was that the trial court refused to discharge the jury after a continuance of 19 days, occasioned by an accident to the defendant, during which time the jurors had separated and returned to their homes. The record of the examination of the jurors, upon the court resuming the trial, does not show misconduct on the part of any juror, or prejudice to the defendant. While this court has not decided an identical case, *Ossenkop v. State,* 86 Neb. 539, and *Penn v. State,* 119 Neb. 95, are analogous in principle and are controlling here.

We have examined the record and the other assignments of error alleged by the defendant and find no prejudicial error. The judgment of the district court is therefore

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, APPELLEE, V. NEMAHA COUNTY BANK, APPELLEE: FIRST NATIONAL BANK, INTERVENER, APPELLANT.

FILED JULY 3, 1930. No. 27439.

1. **Judgment: RES JUDICATA.** Under section 1, art. IV of the Constitution of the United States, the judgment of a court of an-

other state, duly authenticated as prescribed by the act of congress, rendered by a court having jurisdiction of the parties and of the subject-matter, is conclusive between the parties upon the merits or subject-matter of a suit in the courts of this state.

2. **Record** examined and judgment so modified as to give effect to the judgment of another state.

APPEAL from the district court for Nemaha county: JOHN B. RAPER, JUDGE. *Affirmed as modified.*

Edgar Ferneau and *Hall, Cline & Williams*, for appellant.

George W. Ayres, C. M. Skiles and *I. D. Beynon, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ.

GOSS, C. J.

This is an appeal by the First National Bank of Auburn, intervener, from a judgment of the district court for Nemaha county, in which the court held that intervener was entitled to the standing of a depositor only, refused to hold as a trust fund moneys of the Nemaha County Bank in the American National Bank of St. Joseph, Missouri, and directed intervener to release all claims thereto.

Most of the facts were stipulated. Both of the Nebraska banks were located at Auburn. They had a practice or custom of local clearances between them, by which the one in whose favor the clearance showed a balance would receive from the other a draft for that balance. On June 13, 1929, the clearance resulted in the delivery by the Nemaha County Bank to the intervener of a draft for $1,127.17, and on June 14, 1929, of a draft for $4,549.02. Both drafts were made in favor of intervener and were drawn on the American National Bank, where the drawer had ample funds on deposit (as well as other property) to meet them. Ordinarily they would have been accepted and paid promptly. The drafts reached the drawee on June 15 and were not paid for the reason the drawee had then been notified that the department of trade and commerce of the state of Nebraska had taken possession of the Nemaha County Bank on that day. At the time the drafts were given the

Nemaha County Bank was insolvent and later, on August 12, 1929, a receiver was duly appointed. On July 6, 1929, appellant filed an action in the circuit court of Buchanan county, Missouri, against the American National Bank to impress upon the funds and property of the Nemaha County Bank, in the hands of that defendant, a trust to satisfy the drafts heretofore described. The receiver of the Nemaha County Bank intervened therein, participated in the trial and submitted briefs. The issues there were the same as here. While the stipulation of part of the facts made early in the trial herein recites that, at the time of the trial of the case before us, the Missouri action was under consideration by the circuit court of Missouri, it was later shown in the evidence, in support of a reply filed by the First National Bank on January 18, 1930, that the circuit court of Missouri on January 16, 1930, rendered judgment in favor of the First National Bank of Auburn. It was stated in the oral argument before us that an appeal would be prosecuted in the Missouri courts.

The judgment for review here was rendered in the district court January 18, 1930. The receiver had classified the claims of the First National Bank as ranking with depositors. The claimant then pleaded, by its petition in intervention, the facts relating to the issuance, presentation and effect of the drafts, pleaded the fact of bringing suit in Missouri thereon to impose a trust, pleaded the laws of Missouri and that, under the laws and decisions of that state, the funds held by the Missouri bank were impressed with a trust in favor of the claim, and pleaded that, in view of the fact that the Missouri action would probably not be disposed of before the time for filing claims would expire, it had filed its claim herein without prejudice to its right to maintain and prosecute its action pending in Missouri. The prayer was that the district court adjudge the funds and property held by the American National Bank to be impressed with a trust to the extent of the drafts in favor of intervener, and that the receiver hold the cash and securities, if and when received by him, in trust, and that intervener be paid therefrom, as a trust or preferred claim, be-

fore the claims of depositors, and for such relief as intervener is entitled to receive. Issues were joined and trial had. But the district court sustained the classifications of the receiver and allowed the claim as for a deposit, to share with all other *bona fide* depositors in the assets, disallowed the claim as a trust fund, and directed the appellant to release and discharge all legal proceedings, judgments or claims for trust funds against assets of the Nemaha County Bank in possession of the American National Bank or elsewhere. A motion for new trial was duly made and overruled by the district court.

In his answer to the petition of intervention the receiver prayed that the intervener be enjoined from further prosecuting the action pending in the circuit court of Buchanan county, Missouri. In the decree the district court found that the intervener is solvent and that the receiver is not entitled to an injunction as prayed.

Various questions are raised in the record and discussed in the briefs which might in other circumstances require decision here. But in the unusual situation here involved we shall take up only those which we think proper to be decided in the case as it now appears before us for review.

The record contains a copy of the petition and of the final judgment of the circuit court of Buchanan county, Missouri, duly certified according to the act of congress and received in evidence on the trial. The title of the judgment shows that the receiver of the Nemaha County Bank was a party interpleader. The text of the judgment recites that the receiver voluntarily entered his appearance and interpleaded. The court made extended findings of fact and of law and directed the American National Bank of St. Joseph, Missouri, defendant, to pay to the First National Bank of Auburn, plaintiff, the amounts found due on the drafts and to take credit therefor in final settlement between said defendant and said interpleader.

It is urged by the appellant that the district court of Nemaha county erred in failing to give to the judgment of the Missouri court that full faith and credit required under section 1, art. IV of the Constitution of the United States,

which provides: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

Two days before the judgment was entered in the district court for Nemaha county, the circuit court in Missouri, a court of general jurisdiction, having previously heard the evidence and taken it under consideration, decreed that the assets of the Nemaha County Bank, in the hands of the American National Bank of St. Joseph, were impressed with a trust to pay the said drafts drawn upon it and rendered judgment in favor of the First National Bank of Auburn thereon. The receiver of the Nemaha County Bank was a voluntary party thereto, invoking the jurisdiction of the court and asserting his paramount right to this fund as a part of the assets of the bank whose official representative he was by judicial appointment of the district court for Nemaha county. The Missouri court had jurisdiction of the subject-matter and of the parties. The judgment is in no way impeached for fraud or irregularity. If the receiver had won there he would not have complained. Having lost, he is, so far as the record before us is concerned, concluded, unless he can obtain, either in the circuit court or in an appellate court of Missouri, a modification or reversal of the judgment.

It has long been the general rule in this state in relation to the office of a foreign judgment that "The judgment of a state court duly authenticated, as prescribed by act of congress, is conclusive upon the merits or subject-matter of the suit." *Eaton v. Hasty,* 6 Neb. 419. While the district court in the instant case admitted the judicial records from the Missouri court in evidence, we are of the opinion that it did not give them that faith and credit required by the mandate of the federal Constitution. It is true that the court did not in terms say, in the final judgment appealed from, that the claim which it allowed in favor of appellant as a holder of exchange "to share with all other *bona fide* depositors in the assets of said bank" would be unpaid except on condition that appellant release all claims to any trust in the assets. But the order of allowance was coupled

with the specific order, immediately following it, that "said intervener shall forthwith dismiss, release and discharge all or any attachments, garnishments, judgments, processes or claims for trust funds against the funds and assets of the Nemaha County Bank now in possession of the American National Bank of St. Joseph, Missouri, or elsewhere, and that the said intervener forthwith release and relinquish all claim to said securities and funds in so far as they may have possession of the same, and deliver and surrender possession of said securities and funds to the receiver of the Nemaha County Bank of Auburn, Nebraska."

The intervener, however, cannot have a claim both upon the assets in Missouri and upon the assets in Nebraska as a trust fund to satisfy the amounts due upon its draft transactions with the Nemaha County Bank. Having first pursued its remedy in the Missouri courts to a final judgment, it is not entitled in the district court for Nemaha county to more than an allowance of its claim as if it were a *bona fide* depositor in the bank. If the receiver succeed in reversing the judgment of the Missouri court and in obtaining the assets in the hands of the American National Bank upon which the intervener claims a trust to the extent of its drafts (but to all of which assets the receiver claims unqualified title), then no inequity will have been done the intervener here by allowing his claim as a holder of exchange and ranking with depositors. The intervener, however, can have but one satisfaction of its two judgments. If it collect its judgment in the Missouri court, that will satisfy the judgment in the Nemaha county district court. If it ultimately fail to enforce a judgment in the action in the Missouri court, then it will have equality with the depositors in the district court here.

Because both the intervener and the receiver have voluntarily submitted most of the matters in controversy to the Missouri court in the action there and have a judgment at present final, we have expressly refrained from discussing many of the questions ably presented in the briefs. For example, we have not discussed the legal effect of the drafts drawn in Nebraska and payable in Missouri and whether

the law and decisions of Nebraska or Missouri govern; of our statutes turning over assets of an insolvent state bank to the department of trade and commerce and to a receiver of such a bank; and whether, in the circumstances, we would have held that the intervener had an equitable assignment of the funds in the Missouri bank and consequently an enforceable lien thereon to the extent of the drafts, though, subject thereto, the receiver had title to such assets.

For the reasons stated, the judgment of the district court is directed to be modified by eliminating therefrom the findings and order requiring intervener, the First National Bank, appellant herein, to release its claims against the assets in the hands of the American National Bank of St. Joseph, Missouri; and to be further modified by providing that, as to the general claim of intervener, it shall be allowed but one satisfaction of the debt on which the judgment allowing the claim is based. As so modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, APPELLEE, V. NEMAHA COUNTY BANK, APPELLEE: CARSON NATIONAL BANK, INTERVENER, APPELLANT.

FILED JULY 3, 1930. No. 27440.

APPEAL from the district court for Nemaha county: JOHN B. RAPER, JUDGE. *Affirmed as modified.*

Edgar Ferneau and *Hall, Cline & Williams*, for appellant.

George W. Ayres, C. M. Skiles and *I. D. Beynon, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ.

GOSS, C. J.

This is a companion case to *State v. Nemaha County Bank, ante*, p. 59, involving a controversy as to a claim of the First National Bank of Auburn against the Nemaha State Bank, represented by its receiver. The only difference

in the cases is that this involves a claim of Carson National Bank of Auburn, Nebraska, and is based on a draft for $1,446.17, drawn by the Nemaha County Bank on June 14, 1929, on the American National Bank of St. Joseph, Missouri. It was issued for the same cause and followed exactly the same course in litigation and otherwise as the drafts in the other case. The actions were tried at the same time. One bill of exceptions served both cases. They were briefed and argued together. They are controlled by identical rules and it will serve no useful purpose to set forth here the reasons why we are of the opinion that the judgment of the district court should be modified. We content ourselves by adopting, save as to the claimant and the amount of the claim, the opinion and the syllabus in the First National Bank case as ruling here.

For the reasons stated, the judgment of the district court is directed to be modified by eliminating therefrom the findings and order requiring intervener, the Carson National Bank of Auburn, appellant herein, to release its claims against the assets in the hands of the American National Bank of St. Joseph, Missouri; and to be further modified by providing that, as to the general claim of intervener, it shall be allowed but one satisfaction of the debt on which the judgment allowing the claim is based. As so modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

EDWARD HICKMAN, APPELLEE, V. W. T. FENTON, WARDEN, APPELLANT.

FILED JULY 3, 1930. No. 27423.

Criminal Law: MODIFICATION OF SENTENCE. Upon a plea of guilty under an information charging a felony, where proceedings thus far are free from error and where the trial court has jurisdiction of the accused and of the subject-matter of the prosecution, a penitentiary sentence for less than the minimum term prescribed by statute is not void, and after it has been partially served in absence of an appellate review, the trial court is without power to vacate it and impose a greater penalty.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

C. A. Sorensen, Attorney General, and *George W. Ayres,* for appellant.

Adams & Adams, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

ROSE, J.

This is an application for a writ of habeas corpus. Edward Hickman petitioned the district court for Lancaster county to release him from the custody of the warden of the state penitentiary. From a judgment granting the relief prayed the warden appealed.

The question presented by the appeal is the legality of the detention. Following is a chronology of events: March 14, 1924, petitioner, in a prosecution by the state in the district court for Douglas county, pleaded guilty to the charge of incest and for that felony was sentenced to imprisonment in the state penitentiary for a term of not less than three nor more than five years; March 14, 1924, to April 26, 1924, 43 days, imprisoned under the sentence in the jail of Douglas county, awaiting transfer to penitentiary; April 26, 1924, again taken before the district court for Douglas county, sentence vacated, rearraignment on same charge, plea of guilty, sentence to penitentiary for 25 years; April 26, 1924, returned to county jail, taken therefrom to penitentiary and thereafter detained by warden as commanded by mittimus under first sentence until it expired and subsequently detained under mittimus issued September 30, 1927, pursuant to second sentence; January 18, 1930, petition for habeas corpus filed in district court for Lancaster county; January 24, 1930, petitioner released.

The warden contends that the first sentence was void and that the trial court had power to set it aside and impose a lawful sentence at the same term of court and that consequently accused was not twice in jeopardy for the same

offense and not entitled to his liberty, since his term under the second and only valid sentence has not yet expired.

Petitioner insists that the district court for Douglas county had jurisdiction to sentence him in the first instance upon his plea of guilty; that there was no appellate review of the sentence first pronounced and that he was imprisoned 43 days thereunder; that the second sentence was void for want of jurisdiction to pronounce it, as otherwise it would place him twice in jeopardy for the same offense in violation of the Constitution. Const. art I, sec. 2.

There is nothing in the record to show any defect or irregularity in the proceedings prior to the time the first sentence was pronounced. The criminal court then had jurisdiction of the person of accused and of the subject-matter of the prosecution. Directly from the Constitution of Nebraska the presiding judge had power to accept the plea of guilty and to pass upon him the sentence authorized by law. Const. art V, sec. 9. Erroneous exercise of that power was contemplated by the framers of the Constitution and by the people who adopted it, as shown by their declaration that "The writ of error shall be a writ of right in all cases of felony." Const. art I, sec. 23. Power to accept the plea of guilty and to sentence accused was exercised in the present instance and resulted in the indeterminate sentence of three to five years and in imprisonment for that term, though the minimum period fixed by statute was 20 years for the offense charged. Accused did not procure a writ of error or challenge the jurisdiction of the court to impose the first sentence but under it served 43 days in the Douglas county jail, his term dating from the sentence and not from the time he was delivered to the warden. Comp. St. 1922, sec. 10195; *In re Fuller*, 34 Neb. 581.

The source of power to vacate a penitentiary sentence after a portion of it has been served and to impose a new and greater penalty under the same charge has not been pointed out, except in cases of void sentences and in cases where the convict himself applied for a rehearing or invoked appellate jurisdiction for the correction of errors.

A reviewer of the cases in which this subject was judicially discussed said:

"It seems to be well established that a trial court is without power to set aside a sentence after the defendant has been committed thereunder, and impose a new or different sentence increasing the punishment, even at the same term at which the original sentence was imposed. A judgment which attempts to do so is void, and the original judgment remains in force." 44 A. L. R. 1203.

Following the doctrine thus stated, many cases from different jurisdictions are cited in the note, including *In re Jones,* 35 Neb. 499. The report of that case shows that Jones pleaded guilty to the charge of burglary and that he was sentenced to the industrial school for boys on a finding he was under 18 years of age. Upon a subsequent showing that he was over 18 when he committed the felony, and after he had been committed to the industrial school, there was an attempt to revoke the sentence and to require him to serve a term in the penitentiary. In the opinion of the supreme court it was said:

"The sentence and the commitment thereunder to the industrial school being legal, did the court have jurisdiction to sentence the petitioner to the penitentiary after he had undergone a part of the punishment under the first judgment? The answer must be in the negative. While a district court has ample authority to correct a judgment in a criminal case at the term of court at which it is rendered, or a subsequent term, to make the same conform to the one actually pronounced, it has no jurisdiction to vacate a judgment in a criminal case after the same has gone into effect by commitment of the defendant under it, and substitute for it another sentence at the same term of court. The power of a court to revise or change a judgment, even in a civil case, is at an end after the same is in process of execution. The last sentence was illegally imposed, and its enforcement is without authority of law. To sustain the second judgment would be to hold that a person can be twice punished by judicial proceedings for the same offense." *In re Jones,* 35 Neb. 499.

To justify the detention in the present case it is argued that the *Jones* case is distinguishable for the asserted reason that the first sentence therein was valid, while the first sentence imposed upon petitioner herein was void and incapable of putting him in jeopardy within the meaning of the Constitution. There are decisions to the effect that the supreme court may remand a case for a lawful sentence where the one pronounced was void as being beyond the power of the trial court to pronounce and where the accused himself invoked appellate jurisdiction for the correction of errors. *Drawbridge v. State,* 115 Neb. 535; *Knothe v. State,* 115 Neb. 119. In another case it was held that a sentence for a misdemeanor, where nothing has been done under it, may be corrected at the same term of court by the trial judge. *State v. Smith,* 114 Neb. 653.

Was the first sentence of three to five years void? It was effective for the purpose of depriving petitioner of his liberty for 43 days before any attempt to revoke it was made. Under the mittimus issued pursuant thereto accused was detained by the warden until his sentence expired. Preceding the first sentence the proceedings were regular and valid. The presiding judge had constitutional power to accept the plea of guilty and to impose a sentence of 20 years. That power was exercised to the extent of a sentence of three to five years. It was valid as far as it went, but was erroneous in failing to impose the minimum penalty of 20 years. Had no further proceedings been taken, accused could not have been discharged on habeas corpus on the ground that it was void. Following is a recognized rule of law:

"If the court has jurisdiction of the person of the accused and of the crime charged in the information and does not exceed its lawful authority in passing sentence, its judgment is not void whatever errors may have preceded the rendition thereof." *In re Ream,* 54 Neb. 667.

The sentence for a shorter term than that prescribed by law did not exceed lawful authority in imposing it. A well-established principle has been stated thus:

"Habeas corpus will not lie on behalf of a convicted

prisoner on the ground that the sentence to imprisonment is in excess of the statutory period, since such a sentence is erroneous merely, and not void." *In re Fanton,* 55 Neb. 703. See, also, 12 R. C. L. 1208, sec. 27.

This is law in Nebraska and the principle applies with equal force to a sentence for a shorter period than the minimum prescribed by statute. While there are decisions to the contrary, the weight of authority and the better reasoning support the Nebraska rule.

The first or indeterminate sentence which the criminal court imposed upon petitioner was erroneous but not void. It was served according to its terms without having been reviewed in a proceeding in error. It follows that the second sentence under the same charge for the same offense was void. Petitioner is entitled to his liberty and the order discharging him is free from error.

AFFIRMED.

ELIZA G. BLAZIER, APPELLANT, V. EMMA E. ALLOWAY ET AL., APPELLEES.

FILED JULY 3, 1930. No. 27324.

1. **Appeal**: SUFFICIENCY OF EVIDENCE. In an action tried to the district court, the presumption is that such court, having seen the witnesses and having observed their demeanor while on the witness-stand, is therefore in a better position to judge of the weight of the evidence and to pass upon the truth or the falsity of the witnesses generally than is a reviewing court that is confined to the printed page of the record for a review of the evidence.
2. **Deeds**: ANNULMENT. In an action to annul a deed of conveyance of land on the ground of alleged fraud and coercion in obtaining such deed, the instrument will not be annulled nor set aside where the evidence fairly discloses that the grantor understood the terms of the transaction and where it appears that the execution of the instrument was her free and voluntary act and was not the result of undue influence.
3. ———: ———: SUFFICIENCY OF EVIDENCE. The evidence examined, discussed in the opinion, and *held* that the judgment is amply sustained thereby.

APPEAL from the district court for Washington county: HERBERT RHOADES, JUDGE. *Affirmed.*

Clarence T. Spier and *John W. Yeager,* for appellant.

Moher & Carrigan, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

DEAN, J.

Eliza G. Blazier, plaintiff, is a widow past 81 years of age. She began this suit in the district court for Washington county wherein her daughter, Emma E. Alloway, and her daughter's husband, O. S. Alloway, are named as defendants. The object and prayer of plaintiff's petition are to rescind, cancel, and annul a certain deed executed by herself, on or about December 15, 1926, wherein it is provided that plaintiff's daughter Emma shall receive a ten-eighteenths interest in and to the following described tracts or parcels of land, owned by plaintiff, and located in Washington county, namely, the southwest quarter of the southwest quarter of section 4, and the southeast quarter of the southeast quarter of section 5, township 17, range 11, and also lot 18, block 2, in the village of Kennard. The court found for the defendants, and the plaintiff has appealed.

The plaintiff alleges that she was wrongfully induced to execute the deed by the fraudulent, unlawful, and improper designs of her daughter and her daughter's husband, and that they exercised undue influence upon her while she was their guest and a visitor in their home in Enid, Oklahoma. Plaintiff's permanent home is in Kennard, Nebraska, and she has resided there for ten years last past. Plaintiff testified that it was her intention to convey only an eight-eighteenths interest in the land to her daughter Emma, but that the defendants fraudulently connived together and caused a ten-eighteenths interest in the land to be inserted and described in the conveyance. The defendants, however, allege that the plaintiff directed that two-eighteenths of the ten-eighteenths interest should be conveyed by defendants to each of two granddaughters of plaintiff, namely, Gwen-

dolyn Shafer and Gladys Watt (nee McCann), that is to say one-eighteenth interest to each granddaughter.

At the time of the execution of the above named Alloway deed, plaintiff also executed another deed wherein she conveyed an eight-eighteenths interest in the same land to Mrs. Ella I. Fair, another daughter. But Mrs. Fair is not a party to this suit. Both of the above mentioned deeds contain this provision in behalf of Mrs. Blazier, namely: "I reserve to myself the use and full control of the above described real estate and the revenue therefrom during my lifetime."

Plaintiff testified: "Q. All of that time you had intended to give Mrs. Alloway eight-eighteenths of it; is that correct? A. No; I wasn't counting on any eight-eighteenths. I was counting on when I was dead and gone that the property was to be divided among, between my heirs and my granddaughters and there was nothing said about it to anybody. I never said to a living soul what I intended to do. * * * Q. You understand, Mrs. Blazier, do you, that in these deeds that you executed, you retained a life estate in this real estate? Do you understand what I mean, Mrs. Blazier? A. Why I was to have the use of my property as long as I lived. Q. And you understand that in these deeds that was reserved to you, do you? A. Yes. Q. How? A. I wouldn't have signed the deeds any other way. * * * They both was each of them to have eight-eighteenths, my daughters."

Plaintiff also testified that, as soon as the deeds were signed, Mr. Alloway took possession of them and locked them up in his desk. The plaintiff denied that she had the deeds in her bedroom for a week immediately after they were signed, as certain of the proofs tend to prove. And from plaintiff's evidence it appears that Mrs. Fair knew nothing about the drawing up of the deeds until a long time after the event. Plaintiff testified that she read Mrs. Fair's deed but not the Alloway deed at the time they were executed. It appears that plaintiff remained at the Alloway home for three months after the execution of the deeds but she made no complaint to any member of the family about

the deeds. She testified that she is perfectly satisfied with Mrs. Fair's deed, which is not involved in this suit, but that she wants the Alloway deed canceled in its entirety.

O. S. Alloway testified that he had a conversation with plaintiff on the train on a certain trip to Enid, Oklahoma, and that plaintiff said that "her desire was that she dispose of it (her property) in some manner by deed, not wishing to leave any estate. In fact it had been talked over off and on a long time before when she was down there. Nothing definite was ever done at that time. * * * And her first proposition to us was that she would deed the entire property to my wife to be distributed in any way she saw fit. * * * We objected to that in that we didn't want to be responsible for any part of someone else's interest. * * * The sum and substance of it was that it was finally disposed of just as the deeds are written with the understanding that my wife receive the two-eighteenths for those grandchildren and pay that one-eighteenth out of the proceeds after the property was sold. Q. After the death of Mrs. Blazier? A. Yes; after the death of Mrs. Blazier. She held a life estate in the use of the property."

Alloway also testified that the deeds were handed to plaintiff when they were executed and that she retained them in her own possession until they were filed. And it appears that the plaintiff told Alloway how relieved she was that "everything was out of the way." On the Sunday following the execution of the deeds, Alloway and his family, consisting of six daughters and a son-in-law, were present when plaintiff went into her bedroom and returned with the deeds and passed them around for inspection. From his evidence it appears, too, that plaintiff told him she did not tell Mrs. Fair about the deeds because she said "she didn't think it was any of her business and she didn't want her to know anything about it." Alloway denied that he ever did anything to induce plaintiff to execute the deeds.

Mrs. Alloway testified that her mother read both deeds before she signed them, and that she heard M. J. Frantz, before whom plaintiff acknowledged the deeds, ask her if she understood that one deed was for eight-eighteenths and

the other deed was for ten-eighteenths, to which plaintiff replied that she did; and when the deeds were executed the plaintiff took them into her own room and kept them there. It also appears from the evidence of Mrs. Alloway that plaintiff told her several times that "she was so relieved that that was done and she felt she had done better than to have a will," and that, some time later, plaintiff said she was still satisfied with the disposition of her property, and she said "she wouldn't do it any differently today if she had it back again."

M. J. Frantz, the notary public above mentioned, testified that he prepared the deeds under the direction of O. S. Alloway; that the evening of the same day he called at the Alloway home to take plaintiff's acknowledgment, and that he read one of the deeds in full to her and explained that both deeds were alike except as to the grantee's name and the interest conveyed. The notary also testified that plaintiff said she was signing the deeds of her own free will and that it was her voluntary act, and that she examined both deeds in his presence and, from her talk and demeanor, "she seemed to be perfectly satisfied with them," and that he heard no more of the deeds until almost two years thereafter when the present suit was begun.

A lady who witnessed the signing of the deeds, and who resided next door to the Alloways, testified that plaintiff at the time expressed herself, in the presence of the witness, as being "so glad her business was settled, and she couldn't thank me enough. She is very expressive. She said she wanted to thank me—she was so glad to get everything done right, and that was the end of it." The evidence of four daughters and also a son-in-law of the defendants Alloway is to substantially the same effect.

On rebuttal, the plaintiff denied that she ever at any time read the Alloway deed, and testified that she never heard a word that was spoken between Mr. Alloway and the notary, and that she never made a statement to defendants about not being able to trust her daughter, Mrs. Fair, as some of the defendants testified. She also denied that the deeds had been passed around on the Sunday after they

were executed, or that she ever at any time talked with any of the Alloway girls in respect of the deeds, or that she ever told them she was relieved that the deeds were signed.

In the plaintiff's petition and in her brief, the statement appears that she is "aged, infirm, and easily susceptible to influence on the part of her daughter, Emma E. Alloway, and her husband, O. S. Alloway." But no evidence whatever was introduced that tends to prove an allegation of plaintiff's susceptibility nor of the influence of the defendants upon her acts. We have held:

"Where it is sought to cancel a deed for the want of mental capacity of the grantor to make the instrument, the burden of proof is on the one who alleges the mental incapacity." *Brugman v. Brugman*, 93 Neb. 408; *In re Guardianship of Wessel*, 114 Neb. 704; *Hansen v. Roos*, 115 Neb. 761.

The evidence does not show that plaintiff was induced by either Alloway or his wife, or by any other person, to execute the conveyances. The deeds were signed in the presence of a witness and regularly acknowledged by the plaintiff before competent authority. And, besides, there is a reservation, above noted, in both of the conveyances for "the use and full control" by the plaintiff of all of the "real estate and the revenue therefrom" that is involved in this suit, during her lifetime. And it appears to us that the execution of the deeds conserves the safety of the title to the body of the estate in the name of the plaintiff. It is a recognized fact that an aged person of plaintiff's advanced years might, either by chance, or by wicked design, come in contact with some unregenerate person by whom she might be deprived of the title to her estate in its entirety. But the plaintiff has lost nothing in that the entire annual proceeds of the land is secured to her for her sole use and enjoyment so long as she shall live.

In *Nichols v. Emery*, 109 Cal. 323, the court held that, where the owner of real property during his lifetime conveyed such property to a son, as trustee, to sell within ten months after the death of the grantor, reserving the right to revoke such trust, but continued in possession of the land

during the remainder of his life without revoking it, such a conveyance immediately passed a vested interest to the trustee.

"The conveyance of a present interest operates, of course, unless there is a specific reservation of a power of revocation, to cut off all the grantor's rights in the interest conveyed. Having disposed of it by a present conveyance, he cannot retake it; and the conveyance is irrevocable. Hence, it is said that an instrument containing a clause postponing its taking effect until after the maker's death, which passes an interest that is irrevocable, is a deed." 11 A. L. R. 38.

In an action to annul a deed for alleged fraud and coercion in obtaining the deed, reliance cannot ordinarily be placed on the pleadings alone. In the adjudicated cases it clearly appears that such deed will not be set aside where the evidence fails to disclose that the execution was the result of undue influence exercised upon the grantor, but discloses that such conveyance was her voluntary act and that she fully understood the transaction.

The court saw and heard the witnesses and observed their demeanor while they were on the witness-stand. In such case the law is well settled in this jurisdiction that, while this fact, of itself, is not conclusive upon the parties, it is nevertheless of much weight in the premises. The judgment is consistent with the pleadings and is abundantly sustained by the evidence.

Reversible error has not been shown. The judgment is, therefore in all things

AFFIRMED.

STATE, EX REL. TRENMOR CONE, APPELLANT, V. OTTO BAUMAN, COUNTY TREASURER, APPELLEE.

FILED JULY 3, 1930. No. 27222.

1. **Statutes:** CLASSIFICATION OF COUNTIES. For the purpose of legislation, the legislature may classify counties when such classification rests upon some difference of situation or circumstances which, in reason, calls for distinctive legislation for the class. The class must have a substantial quality or attribute which re-

quires legislation appropriate or necessary for the counties in the class and which would be inappropriate or unnecessary for those without the class.

2. ———: CONSTITUTIONALITY: GASOLINE TAX LAW. The proviso in section 2, ch. 166, Laws 1929, is invalid, because it is special legislation and in violation of section 18, art. III of the Constitution.

APPEAL from the district court for Douglas county: WILLIAM G. HASTINGS, JUDGE. *Reversed, with directions.*

Ziegler & Dunn, for appellant.

Henry J. Beal and *W. W. Slabaugh, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

GOOD, J.

This is a mandamus proceeding in which relator sought to compel the county treasurer of Douglas county to turn over or transfer to the county road fund the money by him received from the state treasurer, and which represented Douglas county's proportion of the motor vehicle fuel tax fund. In the trial court the action was disposed of on a general demurrer to relator's petition; the writ was denied and the action dismissed. Relator appeals.

The appeal involves the constitutionality of the proviso contained in section 2, ch. 166, Laws 1929. It is conceded that if the proviso is constitutional the writ was properly denied, and that if it is unconstitutional the writ should have issued.

Chapter 172, Laws 1925, imposes a tax upon the sale and distribution of motor vehicle fuels and provides for the disposition of the revenue derived therefrom. This legislative act was amended in some respects by chapter 151, Laws 1927, and again amended by the enactment of chapter 166, Laws 1929. Section 1 of the latter act provides for the collection by the state treasurer of a tax of four cents a gallon on motor vehicle fuels; and section 2 provides for the distribution of the fund so collected; one-fourth of the net proceeds of the tax collection is required to be

transferred to the several county treasurers in certain proportions, and the amount thus transferred shall be credited to the county road fund. Then follows this proviso: "Provided, the money so transferred to the county treasurers in counties having a population of one hundred and fifty thousand or more shall be used by the county treasurer to pay the interest on and retire any present existing county highway construction bonds, and the balance, if any, shall be credited to the county road fund."

From the record it appears that Douglas county has issued $3,000,000 of highway construction bonds and that it is the only county in which such bonds have been issued. Demand was made upon the county treasurer to transfer to the county road fund of Douglas county the fund so received from the state treasurer. The demand was refused on the ground that, said county having a population of more than 150,000, the disposition of the fund is controlled by the proviso in section 2, ch. 166, Laws 1929. Relator contends that the proviso is invalid because it conflicts with several provisions of the state Constitution, but particularly in that it violates section 18, art. III, which inhibits the legislature from passing a special law where a general law can be made applicable. On the other hand, respondent urges that the proviso is susceptible of two constructions. By the one it might be construed to refer only to bonds existing at the time of the adoption of the legislative act; by the other, that it would apply to bonds existing at the time any of the tax collections were turned over to the county treasurer. Respondent advances the proposition that, where a legislative act is susceptible of two constructions, one of which would render it constitutional and the other unconstitutional, the former is to be preferred.

The legal proposition may be conceded to be sound, and, for argument's sake, it may be conceded that the proviso might be construed to relate to any bonds that might be in existence when the fund arising from the tax is paid over to the treasurer of Douglas county. We are still con-

fronted, however, with the question as to whether the classification is arbitrary and unreasonable.

In *Galloway v. Wolfe*, 117 Neb. 824, this court had under consideration the validity of a statute making it unlawful for any person, of the age of 14 years and upward, to engage in public dancing on Sunday, except in cities of the metropolitan class having a public welfare board, with authority to regulate public dancing, and the court held the act to be in violation of section 18, art. III of the Constitution. Many of the decisions of this court, as well as those from other jurisdictions, were cited and quoted from in the opinion in that case.

We recognize that many statutes, dealing with governmental questions, have classified counties and cities according to their population, and that such classifications have been upheld, but in all of those cases some reason for the classification has been disclosed. We think the rule that should be applied is well stated in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 560, wherein it is said: "The difficulty is not met by saying that, generally speaking, the state when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations, in order to subserve public objects. For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification.'"

The rule is also set forth in 26 R. C. L. 243, sec. 216, in the following language: "It must appear not only that a classification has been made, but also that it is one based upon some reasonable grounds—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection, and there can be no discrimination between subjects which properly belong to the same class."

In 1 Lewis' Sutherland Statutory Construction (2d ed.) 401, sec. 216, it is said: "In respect to the enumerated

subjects as to which legislation is required to be general, and special acts prohibited, though such subjects may be divided into classes distinguished by substantial differences for the purpose of legislation appropriate to such conditions as spring from these differences, there must nevertheless be a limit to such division, even founded on substantial differences. Within certain limits subjects may be grouped on the basis of such differences for general legislation; beyond those limits such differences would not be the basis of classification, but the ground of segregation by which each individual would be distinguished for special enactments. The prohibition is in the way of legislation for individual cases. It is equally fatal to such legislation though it be general in form. If a statute is plainly intended for a particular case, and looks to no broader application in the future, it is special or local, and, if such laws are prohibited on the subject to which it relates, it is unconstitutional."

In *Allan v. Kennard,* 81 Neb. 289, 293, it is said: "It is also true that the legislature may classify the subjects, persons or objects as to which it legislates. But such classification should rest upon some difference in situation or circumstances between the thing or person placed in one class and that placed in another. The power of classification rests with the legislature, and this power cannot be interfered with by the courts, unless it is clearly apparent that the legislature has by an artificial and baseless classification attempted to evade and violate the provisions of the Constitution prohibiting special and local legislation."

In *Edmonds v. Herbrandson,* 2 N. Dak. 270, 274, it is said: "The classification must be natural, not artificial. It must stand upon some reason, having regard to the character of the legislation."

In *Vermont Loan & Trust Co. v. Whithed,* 2 N. Dak. 82, 94, it is said: "But this power of the legislature is circumscribed. It is not an arbitrary power waiting the whim of the legislature. Its exercise must always be within the limits of reason, and of a necessity more or less pronounced. Classification must be based upon such differences in situ-

ation, constitution or purposes, between the persons or things included in the class and those excluded therefrom, as fairly and naturally suggest the propriety of and necessity for different or exclusive legislation in the line of the statute in which the classification appears."

In *State v. Hammer*, 42 N. J. Law, 435, 440, it is said: "But the true principle requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which thus serve as the basis of classification must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation. There must be substantial distinction, having a reference to the subject-matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will, in some reasonable degree, at least, account for or justify the restriction of the legislation."

In *Krause v. Durbrow*, 127 Cal. 681, 685, quoting from *Darcy v. Mayor*, 104 Cal. 642, it is said: "This classification, however, must be founded upon differences which are either defined by the Constitution or natural, and which will suggest a reason which might rationally be held to justify the diversity in the legislation. It must not be arbitrary, for the mere purpose of classification, that legislation really local or special may seem to be general, but for the purpose of meeting different conditions naturally requiring different legislation." Further quoting from the case of *People v. Central P. R. Co.*, 105 Cal. 584, it is said: "The class, however, must not only be germane to the purpose of the law, but must also be characterized by some substantial qualities or attributes which render such legislation necessary or appropriate for the individual members of the class. It may be 'founded upon some natural or intrinsic or constitutional distinction,' but the distinction must be of such a nature as to reasonably indicate the necessity or propriety of legislation restricted to that class."

The rule is well established that the legislature may, for the purpose of legislating, classify persons, places, objects

or subjects, but such classification must rest upon some difference in situation or circumstance which, in reason, calls for distinctive legislation for the class. The class must have a substantial quality or attribute which requires legislation appropriate or necessary for those in the class which would be inappropriate or unnecessary for those without the class.

The outstanding highway construction bonds in Douglas county were issued pursuant to a statute applicable to all counties. The same statute still exists. Each and every county in the state is, by this law, empowered to issue like bonds to aid in the construction of highways. The proviso in section 2, ch. 166, Laws 1929, authorizes Douglas county alone to use its proportion of such tax fund to pay the interest on and retire its highway construction bonds. Every other county in the state that may have heretofore issued, or may hereafter issue, such bonds is denied the privilege of so using its proportion of the tax fund in a like manner. No substantial difference in condition or circumstance is apparent that would apply to counties having a population of more than 150,000 that would not apply to those having a less population. No valid reason has been pointed out, nor can we conceive of any that could exist, which would accord to one county this privilege, while denying it to all others.

It is apparent that the proviso in section 2, above quoted, is special and class legislation and violates section 18, art. III of the Constitution. It is with regret that we are forced to this conclusion, for the reason that it may properly be desirable for any county that has issued bonds to aid in the construction of its highways to use a part or all of the particular tax fund to discharge such bonded indebtedness. However, another legislature can easily remedy the defect by according the same privilege to all counties. Since the provision is invalid, it affords no justification to the respondent in refusing to transfer the tax fund in question to the county road fund.

The judgment of the district court is reversed and the cause remanded, with directions to issue writ of mandamus as prayed by relator.

REVERSED.

BANK OF CRAB ORCHARD, APPELLANT, V. R. G. MYERS, APPELLEE.

FILED JULY 3, 1930. No. 27304.

1. **Set-off.** Mutuality of demands is necessary to entitle a defendant to a set-off, and the respective demands must be between the same persons and in the same capacity.
2. ———. "A claim on the part of a defendant, which he will be entitled to set off against the claim of a plaintiff against him, must be one upon which he could, at the date of the commencement of the suit, have maintained an action on his part against the plaintiff." *Simpson v. Jennings*, 15 Neb. 671.
3. **Executors and Administrators: BANK DEPOSITS: LIABILITY.** An administrator is not personally liable for funds of his decedent which he deposits in a bank and which are lost because of the bank's failure, unless he was negligent in selecting the depository.

APPEAL from the district court for Johnson county: FREDERICK W. MESSMORE, JUDGE. *Reversed, with directions.*

C. M. Skiles and *Jay C. Moore*, for appellant.

M. C. Radke and *F. C. Radke, contra.*

Heard before ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ.

GOOD, J.

This is an action on promissory notes. Defendant admitted the execution of the notes and the indebtedness thereby evidenced, and alleged that he was entitled to a set-off by reason of a deposit he had made in the Bank of Crab Orchard in his capacity as an administrator. The trial court allowed the set-off and rendered judgment for plaintiff for the excess above the set-off. Plaintiff has appealed.

Without conflict the record shows the following facts: Prior to the 15th of August, 1928, defendant was indebted to the Bank of Crab Orchard on several promissory notes, aggregating more than $3,000. Defendant, as administrator of the estate of Isaac S. Platt, deceased, deposited in the plaintiff bank to his credit as administrator funds of the

estate aggregating more than $5,000. The amount of this deposit was reduced by checks drawn thereon so that on October 11, 1928, there was a balance in the account of $3,680.65. On December 10, 1928, the bank became insolvent and was later placed in the hands of a receiver. As administrator, defendant filed a claim for, and there was allowed to him in his representative capacity, the amount of the balance of his deposit, and it was adjudged to be a preferred claim. In June, 1929, a dividend of $736.13 was paid upon the claim, reducing the principal amount of the estate's claim to the sum of $2,944.52. This dividend was by the defendant turned over to the county court as a part of his decedent's estate. On March 30, 1929, this action was commenced by the bank, and, upon the appointment of a receiver, was revived in his name. On April 29, 1929, defendant answered by way of a general denial. On August 23, 1929, defendant, as administrator, filed a report in the county court wherein he recited that it was impossible for him to realize on the funds belonging to said estate that were deposited in the Bank of Crab Orchard, and that only a small amount could be realized from the claim allowed against the bank, further stating:

"Therefore, in order to settle and adjust this matter completely, I have concluded to advance the funds that are due the estate of said Isaac S. Platt, deceased, out of my own individual fund, and as there might in the future be something realized from this deposit in the Bank of Crab Orchard of Crab Orchard, Nebraska, now in the hands of the receivers, I respectfully request that the court order that I, as administrator of said estate, assign to myself as an individual any future payments that might be procured or realized from said deposit to reimburse me for the amount that I now advance out of my own individual fund.

"Total Amount paid into Court this day,

"Private Fund.....$3,043.11"

This report was signed by defendant. On the same day the county court entered an order which, *inter alia*, contained the following:

"That said administrator has so far been unable to realize on the deposit of the funds in the Bank of Crab Orchard by him as administrator of said estate, and that he is now willing and does on this day pay into court his individual funds to the full amount that is due from said Bank of Crab Orchard to said estate and requests that any interest or dividends that might in the future be realized on said deposit in the Bank of Crab Orchard due said estate be assigned to him as an individual to reimburse him for the money that he at this time put up out of his individual fund in the settlement of this estate.

"That such a settlement would be for the best interests of said estate * * * and that all future funds realized on the deposit in the Bank of Crab Orchard of Crab Orchard, Nebraska, now in the hands of the receivers, be assigned to him (R. G. Myers) as his individual property in order to reimburse him for funds advanced individually to make this settlement."

The order further recited that upon the filing of vouchers, showing that he had complied with the order of distribution, the amount due from the Bank of Crab Orchard to the estate of Isaac S. Platt, deceased, "will be assigned to him as his absolute property individually."

Defendant's original answer to the petition was a general denial. The amended answer, in which he claims a set-off, was filed after the county court ordered the assignment of the estate's claim to him as an individual.

Defendant as an individual and defendant as administrator of Platt, deceased, are, in law and in fact, distinct persons. The funds of the estate when deposited in the bank were not the property of defendant as an individual, but remained the property of the estate which he represented. The bank could not have appropriated the deposit to pay or apply on defendant's past-due obligations to it. Defendant and the bank each recognized this fact; the defendant by filing, as administrator, claim for the deposit and procuring its allowance in favor of the estate which he represented and by receiving a dividend thereon and turning the dividend over to the county court, to apply on the

payment of claims allowed against the estate of his decedent; the receiver, on his part, by permitting the claim to be allowed in favor of the estate and paying a dividend thereon, instead of applying it on defendant's past-due obligations to the bank. Defendant did not become individually the owner of the claim represented by the deposit until the 23d of August, 1929.

Set-off as a defense or counter-claim was not, at common law, available to a defendant, but section 8616, Comp. St. 1922, gives to him this right. By section 8620, the right is limited to actions founded on contract, and the set-off is limited to a cause of action arising upon contract or ascertained by the decision of the court. In states having statutes similar to our own it is generally held that mutuality is essential to the validity of a set-off; that is, it must be due to and from the same person and in the same capacity. The word "set-off" in fact implies reciprocal demands existing between the same persons, in the same capacity, at the same time. *Proctor v. Cole,* 104 Ind. 373; *Stokes v. Stokes,* 62 S. Car. 346; *Murray v. Toland,* 3 Johns. Ch. (N. Y.) 569, 573; *Stadler v. First Nat. Bank,* 22 Mont. 190; *Western Coal & Mining Co. v. Hollenbeck,* 72 Ark. 44; *Emerson-Brantingham Co. v. Brennan,* 35 N. Dak. 94. This court has followed the general rule, at least to the extent of holding that a set-off to be available must be a cause of action in favor of the defendant which he could have maintained against the plaintiff at the time plaintiff's action was begun.

In *Simpson v. Jennings,* 15 Neb. 671, it was held: "A claim on the part of a defendant, which he will be entitled to set off against the claim of a plaintiff against him, must be one upon which he could, at the date of the commencement of the suit, have maintained an action on his part against the plaintiff." This same rule was followed in *Shabata v. Johnston,* 53 Neb. 12, and in *Citizens State Bank v. Worden,* 95 Neb. 53.

Defendant argues that, since he, as administrator, had reported to the county court that he had on hand these funds which were deposited in the bank, that was equivalent

to charging himself with the funds and operated to make him the owner thereof, and, further, that he had a personal interest in the deposit, because of the fact that, as administrator, he was under bond to account for the property of the decedent which had come into his possession.

An administrator might have the possession of real estate belonging to his decedent, but such fact would not make the property his. The deposit made by him as administrator did not belong to him in his individual capacity, and if he had attempted to pay out of such funds, his individual obligation to the bank, or any individual obligation to any one else, and the bank had knowledge of it, the bank would be required to restore the amount and to account for it to the estate of the decedent. It is generally the rule that an administrator or executor is not liable for funds of his decedent which he deposits in a bank and which are lost because of the failure of the bank, unless the administrator or executor was guilty of negligence in making the selection of the depository.

In *Harding v. Canfield*, 73 Minn. 244, it was held: "The test of the liability of an executor for the loss of trust funds deposited in a bank which failed is whether he honestly exercised in the premises that degree of care which men of common prudence ordinarily exercise in their own affairs."

In *Officer v. Officer*, 120 Ia. 389, it was held: "An executor may rightfully deposit trust funds to the account of the estate in a solvent bank."

In *In re Curtis' Estate*, 162 Mich. 47, it was held: "An administrator, in the matter of selecting a depository for the funds of an estate, is required to use the care which an ordinarily prudent person would use, and to deposit trust funds in his trust capacity, not as an individual."

In the instant case, there is no showing, nor an attempt to show, that the defendant was guilty of any negligence or want of due care in the selection of the depository; nor that the bank was insolvent at the time the deposits were made. There is nothing in the record from which it can be inferred that the defendant ever became liable to the estate

for the moneys by him deposited in the plaintiff bank until, by his voluntary act, he took an assignment of the claim.

From the record it seems perfectly clear that at the time this action was commenced defendant did not, individually, have a claim against the bank on which he could have maintained an independent action; not until August 23, 1929, did he become the individual owner of the claim which he attempts to use as a set-off, and this was several months after the instant action was begun. Under the rules heretofore announced, the set-off claimed by defendant was not available to him in this action.

It follows that the district court erred. The judgment is reversed and the cause remanded, with directions to enter judgment for the plaintiff for the full amount of its demands.

REVERSED.

ROSE, J., dissenting.

Defendant as administrator of the estate of Isaac S. Platt, deceased, had $3,680.65 on deposit in the Bank of Crab Orchard when it was closed on account of insolvency December 10, 1928. Consequently he could not withdraw the deposit and pay the proceeds to the persons entitled to them. Instead of allowing the Platt estate to lose a portion of the money entrusted to him as administrator, he remained loyal to his trust, preferring to risk an individual loss rather than allow it to fall upon the innocent persons for whom he acted as fiduciary. In his individual capacity, therefore, he paid the beneficiaries of the trust the full amount of his obligations to them as administrator and took in his own name an assignment of their deposit. The county court adjudicated this assignment to be a valid transaction. The insolvent bank then owed defendant as an individual the remainder of the deposit belonging to the Platt estate, after paying a dividend of $736.13. Though the insolvent bank is still owing defendant $2,944.52 on his unpaid deposit, it is demanding from him in this action at law $3,059.25 on his promissory notes in suit, without allowing him credit for any part of its unpaid indebtedness to him. The effect of the decision is to deprive defendant of his unpaid deposit

to the extent of $2,944.52. Under the decision he loses the deposit the insolvent bank owes him and in addition is required to pay the insolvent bank the full amount of his notes, though it owes the Platt estate nothing and all interested parties are before the court.

In my judgment the answer to the petition states facts constituting an equitable set-off to the extent of $2,944.52—a defense established by undisputed evidence.

The opinion of the majority disallows the equitable set-off on the grounds that defendant in his individual right did not own the deposit of the Platt estate when plaintiff sued him at law on his notes; that mutuality of demands essential to a set-off is not shown; that an administrator, in absence of negligence, is not liable to the estate for the loss of funds deposited in a bank. These holdings are in harmony with general rules created by statute and with technical principles enforced in courts of law. They do not apply to the peculiar facts constituting the equitable set-off pleaded in the answer and established by the undisputed evidence.

The district court in allowing the equitable set-off pleaded by defendant exercised higher authority than legislative set-off or principles technically enforced in courts of law. To prevent the injustice of such general laws in unusual instances the people in the exercise of sovereign power said in their Constitution:

"The district courts shall have both chancery and common law jurisdiction." Const. art. V, sec. 9.

This equitable jurisdiction is beyond the power of the legislature to limit or control. *Lacey v. Zeigler*, 98 Neb. 380. The common law is likewise futile for that purpose. The constitutional provision is self-executing. *Matteson v. Creighton University*, 105 Neb. 219. A proper exercise of chancery jurisdiction in exceptional cases may require a court of equity to depart from the strict terms of the statutory set-off and from the exacting rules enforced in courts of law.

Unliquidated claims for damages are not involved in the present controversy. There is no dispute over the exact amount each claimant owes the other. The amount of each

claim is definitely shown. In the original contracts each relied on the solvency and integrity of the other. Defendant as administrator trusted plaintiff with a deposit. Plaintiff, as banker, trusted defendant for the purposes of loans evidenced by his notes. In both personal and representative capacities, defendant was interested morally and financially in the deposit. Under the assignment approved by the county court defendant personally acquired the estate's rights to the deposit. In equity insolvency does not stand on a better footing than solvency and integrity. While a court of equity follows the same general rules as a court of law in considering a plea for a set-off, and while there must generally be mutual debts to authorize a set-off, there are exceptions to these general rules. Exceptions were recognized by Chancellor Kent in *Duncan v. Lyon,* 3 Johns. Ch. (N. Y.) 351. Special circumstances may create an equity calling for the allowance of a set-off not grantable in a court of law. *Hughes v. Trahern,* 64 Ill. 48, wherein the court said:

"At law there can be no set-off except as to mutual debts between parties to the record, but the doctrine is that a court of equity, in cases of insolvency, will regard the real parties in interest, and allow a set-off of demands in reality mutual, although prosecuted in the name of others nominally interested."

To give effect to a clear equity and to prevent irremedial injustice a set-off may be allowed, though the debts are not mutual. *Vulliamy v. Noble,* 3 Mer. Eng. Ch. 592, 620; *Brewer v. Norcross,* 17 N. J. Eq. 219.

The equity of defendant herein is perfectly clear. He did not lose his equitable right to a set-off by the insolvency of plaintiff or by his consequent failure, before he was sued, to acquire as an individual his deposit as administrator. His set-off was pleaded in his answer and plaintiff had timely notice of it. In my view of the facts and of the rules of equity and justice, the district court properly allowed the set-off.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. FARMERS STATE BANK OF POLK ET AL., APPELLEES: LEO E. HAHN, APPELLANT.

FILED JULY 9, 1930. No. 27387.

Banks and Banking: GENERAL DEPOSIT. Record examined and found to reflect a "general" and not a "special" bank deposit.

APPEAL from the district court for Polk county: HARRY D. LANDIS, JUDGE. *Affirmed.*

H. G. Wellensiek, for appellant.

C. M. Skiles and *I. D. Beynon, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

PER CURIAM.

The appellant, Leo E. Hahn, in the trial court sought to have the assets of the failed Farmers State Bank of Polk impressed with a trust for the amount of a claimed special deposit made by him, and for priority of payment out of such assets. His request was denied, and he appeals.

The only error assigned is that the court erred in finding and holding that the claim of the appellant was a general deposit and not a trust fund entitled to priority payment from the assets of the bank.

The facts involved, as shown by the record, are, in substance, as follows: On August 18, 1928, Hahn executed and delivered to the aforesaid bank his promissory note for $600, which had been thereafter by such bank negotiated to the Harvard State Bank. Later, Hahn, in payment for some stock, bought by him from the Blain Live Stock Company, had given it a check, drawn on his checking account in such Farmers State Bank, for the sum of $2,478. Hahn then obtained from his father a loan of $3,000, for which amount his father gave him his two checks, one for $2,000 and another for $1,000. Hahn then took these checks to the Farmers State Bank, of which he was a stockholder and director, and asked that he be given credit for the two checks. This was done at the time by the cashier making out in Hahn's

presence an ordinary deposit slip. On receipt of the checks constituting the $3,000 deposit, and in the usual course of business, the Farmers State Bank transmitted these checks to its correspondent bank in Omaha, where they were received and credited to an overdraft held by the latter bank against the former. Immediately following the making of the deposit by Hahn, and in furtherance of this same transaction, as we conclude, Hahn informed the bank that he had given the $2,478 check, which was to be, and in fact was, paid out of such deposit. He also stated that he wanted to take up the above $600 note, and, being informed by the cashier of the bank that such note was then held by the Harvard State Bank, Hahn left, and in eight or nine days thereafter returned, and again said he wanted to pay the note, and, again being informed that the note was still in the Harvard State Bank, he drew his check on his deposit in the Farmers State Bank in favor of the latter for $609.33, the face of the note and interest, which check was charged to his account and later returned to him as canceled, and in lieu of such Hahn check the bank issued its cashier's check for the amount in favor of the Harvard State Bank, but retained the same without delivery. Within a day or two after the date of the execution of such cashier's check, the Farmers State Bank was taken over by the department of trade and commerce, and afterwards a receiver was appointed. Hence, by operation of law this cashier's check passed into the possession of the aforesaid department, thence later into the hands of the receiver, where the same remains.

The whole transaction is without a showing of fraud or deception. Further, the record does not reflect facts which would give to Hahn a right superior to, or different from, that of any ordinary general depositor.

The judgment of the trial court is

AFFIRMED.

ARTHUR D. COMPTON, APPELLANT, V. ELKHORN VALLEY DRAINAGE DISTRICT, APPELLEE.

FILED JULY 9, 1930. No. 27420.

1. **Drainage Districts:** LIABILITY. A drainage district organized in 1909 under chapter 153, Laws 1907 (Comp. St. 1922, secs. 1813-1862) is liable for damages caused by the negligent construction of its works.
2. ———: NEGLIGENCE. Such construction will be considered negligent if the drainage district collect surface water from another watershed in the district and conduct it in a volume to land of one of its members without making reasonable provision to carry such water to a point where it will not do damage to such land or the crops thereon.
3. **Limitation of Actions:** DRAINS. A cause of action will arise in favor of one so damaged when the damage occurs and not as of the date of the original construction of the works.
4. **Drainage Districts:** DAMAGES. The damages for which the drainage district will be liable will be those caused by reason of the volume of such water thus negligently allowed to affect such land or crops.

APPEAL from the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Reversed.*

Mullen & Morrissey and *Rose, Wells, Martin & Lane,* for appellant.

Courtright, Sidner, Lee & Gunderson and *George DeLacy, contra.*

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

PER CURIAM.

This is an action against a drainage district for damages to crops on lands within the district. Plaintiff appeals from the judgment on a verdict directed by the court against him at the conclusion of the plaintiff's evidence.

The defendant, Elkhorn Valley Drainage District, was organized in 1909 under the act of 1907. Laws 1907, ch. 153 (Comp. St. 1922, secs. 1813-1862; Comp. St. 1929, secs. 31-501 *et seq.*). The district comprises about 55,000 acres in Douglas and Sarpy counties, the majority being in the

former county. Plaintiff's land, on which he alleges the damages arose, is the east three-fourths of section 21, township 15, range 10, in Douglas county. It lies in a section of land between the Platte and Elkhorn rivers, though not adjacent to either river. About 1879 the county made a road ditch on the east side of this section and another on the west side thereof. After the drainage district was organized in 1909, it asked the county board for right of way to enlarge the road ditches on the east and west sides of this section so as to make them a part of the drainage system. The county commissioners refused. The district thereupon proceeded to obtain the right through condemnation proceedings in the county court, after which in due time it enlarged and deepened these ditches, increasing their capacity by a considerable multiple. For some years they served the plan to carry other water of the system past plaintiff's land as well as to aid in draining his land. Gradually they filled up with silt and other matter so that, according to the pleadings and evidence offered tending to prove his allegations, in 1923, 1924 and 1925 the crops on his lands were damaged by reason of the failure of the defendant to maintain these ditches by cleaning them out so that they might continue to perform their originally intended functions.

There was evidence to the effect that the ditch on the west side of the section in question was so constructed and connected with a portion of the district northwest of this land as to carry the water from approximately a square mile of watershed that formerly drained into the Elkhorn river without coming to the plaintiff's land; and that the ditch on the east side of plaintiff's land was so constructed and connected with a portion of the district farther north consisting of approximately 160 acres that also formerly drained into the river without coming to plaintiff's land. There was evidence also that when the east ditch was constructed there was a road bridge at the intersection at the northeast corner of section 21, under which the water coming to that point passed from the west toward the Elkhorn river. The district removed that bridge and filled up the

road so that what water theretofore went east from that point thereafter went down the enlarged ditch along the east side of plaintiff's land. It was purposed and effected thereafter to carry all of the water reaching this northeast corner of the land from the west down the road ditch on the east side of and past plaintiff's land along with the water that came from the north.

While some auxiliary propositions are discussed by the parties in their briefs, they agree in substance that the decisive question involved here is whether the drainage district is under a legal obligation to maintain its works by cleaning out the ditches. This, also, was the understanding of the experienced trial judge, whose discussion of the matter, when he decided the proposition in the negative and instructed the jury to return a verdict for the defendant, appears in the record.

In *Bunting v. Oak Creek Drainage District*, 99 Neb. 843, the district was also formed under the act of 1907 as amended. We affirmed a judgment for damages to plaintiff's land, holding the district liable for damages caused by its negligence in the construction of its works. In that case, also, it was held that damages caused unnecessarily by negligence and improper construction cannot be anticipated and a right of action accrues therefor when the damage occurs.

In *Hopper v. Elkhorn Valley Drainage District*, 108 Neb. 550 (same defendant as here) we affirmed a judgment for damages to crops. The second point in the syllabus says: "A drainage district corporation organized under the laws of this state, although a local corporation clothed with powers of a public nature, is liable for damages caused by its negligence in the construction or maintenance of its works." It seems, however, in that case the damage was caused by the original faulty construction of the ditch and failure to have made a dyke; that the ditch had an angle so abrupt that it would not permit the water to flow through it properly but caused refuse and debris to collect and hold the water back; and that where it emptied into the river a floodgate was so constructed that in high water the river flowed back through the ditch and damaged Hopper's land.

So the question of maintenance was not there involved strictly in the sense it is here understood.

In *Miller v. Drainage District,* 112 Neb. 206 (while we note that it arose under chapter 161, Laws 1905, or under that act as amended), we affirmed a judgment for damages to crops by flooding. The opinion holds that the district is liable "for damages caused by its negligence in the construction or maintenance of its works." Here, too, the fault would seem to have been in the original construction of the ditch rather than in its maintenance, for, in stating the nature of the case, the opinion says: "The improvement was constructed partly by digging a new ditch and partly by using the natural channel of what is known as Muddy creek. The negligence alleged is that the defendant district failed to widen and clear the natural channel of Muddy creek so used as a part of the improvement; and that it was negligent in constructing the new ditch narrower and shallower at some points than others; and that the district negligently allowed drifts and debris to accumulate and remain in the old channel of Muddy creek, thus retarding the escape of the flood waters and causing them to run over and upon plaintiff's lands doing damage to the crops thereon."

Flader v. Central Realty & Investment Co., 114 Neb. 161, was an injunction suit to prevent the construction of a dam across Oak creek. Oak Creek Drainage District and others intervened. The purpose of the dam was to divert the water of the creek into a lake owned or controlled by the original defendants. The district court denied the injunction. This court reversed the judgment. While the body of the opinion, in reciting some of the features of the act of 1907, stated among other things that the law imposes upon the drainage district "the duty of keeping the ditches in repair," this idea was not reflected in the syllabus. It was not necessary to a decision of the case and it was used by the court in argument rather than as a vital proposition of law in an action for damages for negligence between a party damaged and the drainage corporation organized under the law.

Thus, the cases to which we have referred do not seem to have passed with authority upon the question of the duty of defendant, under the statute and the law, to keep its ditches cleaned out; nor do we find anything in the statute itself which imposes upon such a district the positive duty of cleaning out ditches properly constructed and established; nor was there anything in its petition to the county board at the time the district was organized or in the proposition submitted to those having land within the proposed district that specifically bound the district when organized to maintain its ditches by cleaning them out after they were once properly constructed. Section 1 of the act (Comp. St. 1922, sec. 1813) authorized that "a drainage district may be formed and may proceed as hereinafter provided, for the purpose of inaugurating, constructing, controlling and maintaining said work or works of public improvement," but it did not, as heretofore stated, specifically provide that such a corporation must maintain its works. Section 20 of the act (Comp. St. 1922, sec. 1838) gave the board of directors authority to employ an engineer to "proceed according to their best judgment to carry out such work of the character mentioned in paragraph one hereof, as they deem for the public health, convenience and welfare." Section 1848, Comp. St. 1922, being an amendment of section 30 of the original act, provides that, there being no debts outstanding, the corporation may be dissolved by a three-fifths vote of the members. It seems that it was in the contemplation of the legislature that the district through its officers should be granted the responsibility of constructing the works for drainage of the lands of the district and were given the discretion to adopt and carry out proper plans to effect that purpose, without ordinarily being required to preserve the ditches in perpetuity after once constructed so as to effect their object.

But there is a further phase of the action that was lost sight of by the drainage district when it neglected to clean out these ditches and which we think was not given its proper influence by the district court. Section 21, art. I of the Constitution, provides: "The property of no person

shall be taken or damaged for public use without just compensation therefor." The words "or damaged" were inserted in the sentence in 1875. When the defendant collected the water from the other two watersheds that were not wont to pass near plaintiff's land and conducted them in volumes through its ditches adjoining plaintiff's land and when it closed up the ditch at the intersection at the northeast corner of his land so that water escaping there was forced to come down the ditch east of his land, did not the defendant assume the duty of so caring for such foreign surface waters that they would not damage plaintiff's property? Was it not a continuing duty? If the ditches provided by the defendant failed to care for the additional burden of these foreign waters, then did the cause of damage relate back to the original construction of the ditches upon which the defendant chose to cast the burden? Did the legislature intend or could it give such a district a vested right to collect these waters and cast them upon plaintiff's land merely by reason of the fact that it had condemned a right of way along the public roads for the course of the particular ditches?

It has long been a uniform rule in this state that one may not lawfully collect and by means of a ditch discharge surface water upon the land of his neighbor to his neighbor's damage. *Davis v. Londgreen*, 8 Neb. 43; *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb. 138; *Bunderson v. Burlington & M. R. R. Co.*, 43 Neb. 545; *Jacobson v. Van Boening*, 48 Neb. 80; *O'Kieffe v. Chicago, B. & Q. R. Co.*, 96 Neb. 518; *Keifer v. Shambaugh*, 99 Neb. 709. Sometimes injunction has been allowed as the remedy to prevent the act, where injunction would be effective, and sometimes actions for damages have been the remedy after the damages occurred and were capable of being ascertained. The right of action accrues when the damage occurs and the statute of limitations does not begin to run until then. *Omaha & R. V. R. Co. v. Standen*, 22 Neb. 343. Behind the rule is the provision of the Constitution that one's property may not be damaged without compensation.

The main purpose of the drainage company in condemn-

ing the right of way for the road ditches on the east and west sides of section 21 was that it might enlarge them so that they would carry the drainage waters on their way. The district now contends, as we understand it, that the condemnation took into consideration all damages that plaintiff might suffer, and that therefore he is without remedy. A situation analogous in principle arose in a surface water collection and diversion and is reflected in *Iske v. Missouri P. R. Co.*, 94 Neb. 9, 13, where this court decided the matter adversely to this contention and cited several cases as authority for the ruling. It can readily be understood why, if the only purpose of these ditches was to care for drainage of the lands of plaintiff and others in his watershed, the district might in its discretion neglect or delay to clean them out under the letter and spirit of the drainage act. But when they bring waters into these ditches from a foreign watershed and expressly condemn the right of way in order to carry the added burden, we do not think they are protected by their condemnation proceedings from responding in damages to the extent that this added burden caused such damage. We are of the opinion that this relates back to the original construction and the plans therefor and execution thereof, and so far as necessary to the maintenance to prevent the evil that should have been anticipated in the original construction; with the result that the district is liable for such damages to plaintiff's crops as may be found to be caused by the surface water collected from the other watersheds and brought to his land and left there by the failure to take care of this extra burden.

For the reasons stated, the judgment of the district court is reversed and the cause remanded.

REVERSED.

THOMPSON, J., dissenting.

In my view the majority opinion does not fairly state the issues presented in the cases of *Bunting v. Oak Creek Drainage District*, 99 Neb. 843, *Hopper v. Elkhorn Valley Drainage District*, 108 Neb. 550, *Miller v. Drainage District*, 112 Neb. 206, nor the law applicable to the facts reflected by the

records therein. Further, such majority opinion neither sustains nor overrules our holdings in the above named three cases, to the effect that a drainage district must maintain the system after once constructed, and not be guilty of negligence in the course of such maintenance.

"In construing an act of the legislature, the court will give to it the meaning which it is apparent from the language used that the legislature had in mind when the act was passed." *State v. Hanson,* 80 Neb. 738.

In determining the scope and purpose of an act, as was done in the *Bunting* case, such determination is pertinent to the issues involved, is instructive, and as to the legislative intent is illuminating and conclusive. Further, such determination cannot be classed as dictum, hence it is binding as a legal precedent until reversed.

In the discussion of the trial court on the motion for a directed verdict, which discussion is made a part of the bill of exceptions herein, and is not refuted in the majority opinion, it is submitted that the rule applicable to a county, under our law holding it without liability for the negligence of its officers unless specifically so provided by statute, is applicable to a drainage district and its officers. The status of such a drainage district is, in the *Bunting* case, *held* to be that of a city, town, or village, created under general law, and not that of a county.

As an indication of what is covered by the act of 1907 (Laws 1907, ch. 153; Comp. St. 1922, secs. 1813-1862) referred to in the majority opinion as the one under which the appellee drainage district was organized, and as material to the matters involved herein, attention is called to sections 1813, 1826, and 1838, Comp. St. 1922.

Section 1813 provides: "Whenever it will be conducive to the public health, convenience or welfare, either to drain any wet land; or to drain any land subject to overflow by water; or any land which will be improved by drainage; or to build or construct any dike or levee to prevent overflow by water; or to construct, straighten, widen, deepen or alter any ditch, drain, stream, or water course; or to riprap or otherwise protect the bank of any stream or ditch; or to

construct, enlarge, extend, improve or maintain any system of drainage; or to construct, enlarge, extend, improve or maintain any system of control of surface water or running water; or to do any two or more of said things jointly; then a drainage district may be formed and may proceed as hereinafter provided, for the purpose of inaugurating, constructing, controlling and maintaining said work or works of public improvement." The foregoing quotation is a fair reflection of the title of the original act. Laws 1907, ch. 153.

Section 1826 provides, among other things: "The apportionment, when finally adjusted, shall continue as the basis of all levies of special assessments to pay all expenditures for organization, construction, improvement, enlargement, extension, damages, costs, maintenance, bonds and interest thereon, and all other expenses."

While there have been amendments to certain of the respective sections of such act, these amendments, however, in no manner affect the matters here in question, save that as to section 1838, entitled by the compiler, "Contracts for construction and repair," which was amended in 1921 (Laws 1921, ch. 280) by adding thereto the following: "Provided, however, that nothing in this section shall be construed to prevent the board of directors from hiring one of their members by the day to superintend maintenance work within the district. The board of directors shall likewise, when in their judgment it is for the best interest of the district, be empowered to purchase all necessary machinery and equipment for the purpose of maintaining, cleaning out or reconstructing existing ditches, or for the purpose of constructing new ditches within said district, and for such work may hire by the day, week or month all necessary help."

In defining the scope and purpose of the above referred to act of 1907, we held in the *Bunting* case, *supra*: "A county is a mere local subdivision of the state, created by it without the request or consent of the people residing therein," hence, not liable for the negligence of its officers unless so provided by statute.

Further, as to municipal corporations, we said in the *Bunting* case, quoting from *Woods v. Colfax County*, 10 Neb. 552: "If the negligence complained of in the petition and consequent injury to the plaintiff had been occasioned by a natural person or a municipal corporation proper, the right to recover would be unquestioned. * * * Municipal corporations may be defined to be bodies politic and corporate, created by law for the purpose, primarily, of regulating and administering the local and internal affairs of towns, cities and villages. 1 Dillon, Municipal Corporations (3d ed.) sec 9. Such corporations (municipal) are created principally for the benefit and convenience of the inhabitants composing the corporation, although they are important auxiliaries of the state in the administration of the law. The charters conferring powers, prescribing duties, and imposing burdens must in some way receive the assent of those to be governed by their provisions, and they thus accept the benefits and agree to perform the duties imposed upon them."

As held by us in *Burke v. City of South Omaha*, 79 Neb. 793: "The making, improving and repairing of streets by a municipal corporation relate to its corporate interest only, and it is liable for the wrongful or negligent acts of its agents in performing such duties." The same view is expressed in *Levin v. City of Omaha*, 102 Neb. 328. For a comparison of holdings on this same subject in different states, see 52 A. L. R. 524.

In the *Bunting* case, *supra*, it was further stated: "Drainage districts organized by vote of landowners * * * are voluntary corporations (as are municipal corporations) principally for the benefit of the owners of the land lying in the district incorporated. In determining whether such districts shall be organized, any person (within the district) may cast one vote 'for each acre of land.' * * * A majority of the votes is necessary for the formation of the district. * * * (Then quoting from *Bradbury v. Vandalia District*, 236 Ill. 36) 'The ground of distinction between corporations which are liable for the negligent or wrongful act of their agents or servants and those which are not is that

public involuntary quasi-corporations are mere political or civil divisions of the state created by general laws to aid in the general administration of the government and are not so liable, while those which are liable have privileges conferred upon them at their request, which are a consideration for the duties imposed upon them. * * * Neither the state, nor any part of it, is divided by the legislature into drainage districts, nor do they have public duties thrust upon them without their consent. The organization of a drainage district is for the sole and exclusive benefit of the territory within the district, * * * and the lands within the district are assessed to pay the whole cost on the theory that they alone are benefited. * * * The organization is not different, in principle, from the organization of cities, villages or towns under a general law, on a petition of a certain proportion of the legal voters within the territory.' The district chooses its own board of directors and its work is done under its direction and supervision. It is given certain additional powers and privileges because the formation of the district 'will be for the public health, convenience and welfare.' * * * In the conduct of their affairs they must not negligently injure others. If they do, they are liable for such injuries as cities and villages are."

As comprehensive of the duty thus imposed, we stated in the first syllabus of the *Bunting* case: "Local corporations (such as drainage districts) created by request or consent of the persons residing in the territory incorporated and principally for their benefit, although they are clothed with powers of a public nature, are liable for damages caused by their negligence." Thus, their liability for negligence is general.

If, as thus stated, a drainage district partakes of the nature of a city, town or village, it needs but to be mentioned to be recognized that such drainage districts, operating in their corporate capacity, assume the same responsibilities and liabilities for the negligence of their officers as do cities, towns or villages while operating in their corporate capacity; this, not only for negligence in construction, but for negligence in failing to maintain as well as negligence

in the course of such maintenance. In other words, such drainage districts are liable for any of their negligent acts of commission or omission forming the proximate cause of injury to another.

The statute, as originally enacted, also as it stood at the time the *Bunting* opinion was adopted, provided for maintenance; and after its adoption, was strengthened by the amendment of section 1838 in 1921 (Laws 1921, ch. 280) by which amendment it was provided, as we have seen: "The board of directors shall likewise, when in their judgment it is for the best interest of the district, be empowered to purchase all necessary machinery and equipment for the purpose of *maintaining,* cleaning out or reconstructing existing ditches, or for the purpose of constructing new ditches within said district, and for such work may hire by the day, week or month all necessary help." This section implies a duty to maintain, and simply permits the purchase of machinery, if by the board deemed wise, on their complying with the provisions. Further, such section 1838 saves to the board the authority previously conferred to hire one of its own members to superintend maintenance work within the district.

We have consistently followed the rule announced in the *Bunting* case, and, so doing, have refused to class drainage districts in the same catagory with counties, up to and until this majority opinion, at least indirectly, changes the rule.

While, in the *Bunting* case, the broad rule was announced that a drainage district, such as this, was liable for negligence, as was a city, town or village, the liability of such a district was never succinctly stated as applying to negligence in failing to maintain or negligence in the course of maintenance, until we considered the *Hopper* case, 108 Neb. 550, 563, and it was there stated, in the course of the opinion: "The allegations in plaintiff's petition are that the defendant carelessly and negligently constructed its drainage ditches and thereafter maintained the same so that the plaintiff's lands were flooded and his crops injured or destroyed; that the negligence in the construction and

maintenance of said ditches by defendant company was the proximate cause of the damages set forth in the four causes of action.

"The question to be decided under this assignment of error is whether the provisions in said deeds relieved the defendant from all its responsibility for negligence, provided the ditches were constructed and maintained according to the then present or the future plans of the drainage district.

"The question can be answered by the application of certain established principles of law relating to damages caused by negligence. This court has held in *Bunting v. Oak Creek Drainage District*, 99 Neb. 843, that a drainage district corporation, although a local corporation clothed with powers of a public nature, is liable for damages caused by its negligence in the construction of its works. In the same case this court further held that 'damages caused unnecessarily by negligence and improper construction of the improvement cannot be anticipated, and a right of action accrues therefor when the damage occurs.' When these legal principles are applied to the allegations in plaintiff's petition and to the evidence in support thereof, the question would seem to be answered in the negative. It was the plain legal duty of the drainage district corporation to so construct and maintain its ditches as to not work injury to the lands and crops of plaintiff, and as it did not do so it was liable for the damages."

And in the syllabus we announced the following rules of law:

"A drainage district corporation organized under the laws of this state, although a local corporation clothed with powers of a public nature, is liable for damages caused by its negligence in the construction or maintenance of its works.

"Damages caused unnecessarily by the negligence and improper construction and maintenance of the improvements of a drainage district corporation cannot be anticipated and a right of action accrues therefor when the damages occur.

"A party who sells and conveys to a drainage district

corporation a right of way through his lands, and in such conveyance releases such corporation from all claims for damages by reason of the occupancy and use of the land conveyed, may nevertheless recover damages caused by the carelessness and negligence of the district in the construction and maintenance of its improvements."

Then, in *Miller v. Drainage District,* 112 Neb. 206, 209, dealing with the same subject, but under a different act (Laws 1905, ch. 161, and amendatory acts; Comp. St. 1922, secs. 1744-1812) we said: "The plaintiffs are not seeking damages which arose from natural causes, but from the careless and negligent construction and maintenance of the ditch. It is also contended by defendant that it was not liable for damages for either faulty construction or lack of maintenance. The aforesaid cited case (the *Hopper* case) held: 'A drainage district corporation organized under the laws of this state, although a local corporation clothed with powers of a public nature, is liable for damages caused by its negligence in the construction or maintenance of its works.'" And in the syllabus we held: "A drainage district organized under chapter 161, Laws 1905, as originally enacted, or under the act as amended, is liable for damages caused by its negligence in the construction or maintenance of its works."

While in this *Miller* case we were construing a different act, however, such act, too, was governed by the announcement in the *Bunting* case, as each drainage district being considered in these respective cases was a voluntary association or corporation controlled by the rules governing cities, towns or villages.

However, to avoid the force and effect of the law as announced in the *Hopper* and *Miller* cases, the majority opinion says of the former: "It seems, however, in that case the damage was caused by the original faulty construction of the ditch and failure to have made a dyke;" and of the latter, "Here, too, the fault would seem to have been in the original construction of the ditch rather than in its maintenance."

The writer hereof wrote the opinion in the *Miller* case,

and has, since the majority opinion was submitted, examined the pleadings in both the *Miller* and *Hopper* cases carefully, and finds that in each thereof it was specifically charged that the negligence complained of was in the construction, as well as in the manner of maintenance and failure to maintain. Further, in each of such cases the duty to maintain was not only declared in the body of the opinion, but was, as above indicated, carried into the syllabus and made, unquestionably, not only the law of those cases, but the law of the state, and it is controlling as to the proposition here involved. Again, the expression quoted in the majority opinion from the *Miller* case, to wit, "The improvement was constructed partly by digging a new ditch and partly by using the natural channel of what is known as Muddy creek. The negligence alleged is that the defendant district failed to widen and clear the natural channel of Muddy creek so used as a part of the improvement; and that it was negligent in constructing the new ditch narrower and shallower at some points than others; and that the district negligently allowed drifts and debris to accumulate and remain in the old channel of Muddy creek, thus retarding the escape of the flood waters and causing them to run over and upon plaintiff's lands doing damage to the crops thereon," when fairly construed, conclusively shows that the court was, at the time of the preparation of the quoted expression, considering a case wherein the issues involved both negligent construction and negligent maintenance; otherwise, why the expression, "and that the district negligently allowed drifts and debris to accumulate and remain in the old channel of Muddy creek." It is self-evident that the drifts and debris which were allowed to accumulate and remain in the old channel of Muddy creek must have accumulated and remained after the creation of the district and the construction of the ditch, and not before.

It cannot be challenged that the act in none of its provisions specifically provides that the district shall be liable for negligent construction of its works. Yet, this majority opinion in the syllabus holds that the drainage district

is liable for negligent construction. Why? Simply for the reason that the same is made manifest by the spirit and intent of the act. Is it not, in reason, more manifest from the act that to negligently fail to maintain renders the district liable for damages arising by reason of such negligence? As an illustration, consider the record in this case: Here we have a drainage district, organized in 1909, comprising about 55,000 acres of land, which land was of little value until a system of drainage was perfected, at great expense. This system performed its intended functions for a time, and thereafter was maintained by the district in certain years when such maintenance was necessary and called for. (No negligence is charged in the instant case to have taken place in the original construction.) Then, at the dates charged in the petition, though repeatedly requested and urged so to do by plaintiff and others, the board of directors refused and neglected to maintain the system to the plaintiff's damage, as alleged, by reason of the spread of the accumulated surface waters and the rise of the subsurface waters. Thus, a profitable investment was rendered unprofitable, and a sanitary and healthy condition made insanitary and unhealthy. So, such negligent act not only injuriously affected the owners of the land, but also the general public.

To hold as appellee drainage district insists that we should hold would be to convert this purposeful act of our legislature into an alluring snare. Therefore, we again assert that the drainage district's duty is, not only to properly construct the system of drainage, but also to properly maintain the same.

Further, while there is vested in the drainage district board a reasonable discretion, any abuse of such discretion may be relieved against by a proper proceeding in court. *Sandy v. Western Sarpy Drainage District,* 102 Neb. 713. The same rule is applicable to cities, towns or villages. *City of Pierce v. Schramm,* 116 Neb. 263.

The fact is, plaintiff's damage, if any, is caused solely by the district's negligence in failing to maintain, and not by the collecting of surface water from another watershed

in the district and conducting it in a volume to the land of plaintiff.

It seems that the majority opinion claims to find support in its assertion that there was nothing in the petition to the county board at the time the district was organized, or in the proposition submitted to those having lands in the proposed district, that specifically bound the district to maintain its ditches. To this it is sufficient to say that the petition of the landowners, as indicative of the desire of the petitioners, quotes in full, as a part thereof, the title of the act of 1907, and also facts sufficient to bring the petitioners within the provisions of the act, as such act is indicated by the sections thereof hereinbefore quoted; and the notice published sufficiently embodies such purpose in its provisions. True, there is nothing specific in the act requiring construction of the system, and nothing specific requiring the district to maintain after construction; but, without question, it is conclusively implied that, if the district does construct, it must not construct in a negligent manner, and that after it has constructed its duty is to properly maintain such construction. Otherwise, the purpose of the act is defeated.

Again, it is submitted that in the *Hopper* and *Miller* cases we correctly stated the law applicable to the issues presented; and such law is controlling in the case now before us.

PETER MEHRENS ET AL., APPELLANTS, V. OTTO BAUMAN, TREASURER, APPELLEE.

FILED JULY 9, 1930. No. 27277.

1. Officers: COUNTY TREASURERS: MOTOR VEHICLES: LICENSES. The duties of a county treasurer pertaining to the licensing of operators of motor vehicles, under chapter 148, Laws 1929, are foreign to the regular duties of such officer.
2. ———: ———: ———: FEES. Under the provisions of section 6, chapter 148, Laws 1929, the authorization of a fee of 25 cents to be paid to the county treasurer by each applicant for a motor vehicle operator's license, issued by such county treasurer, is a lawful exercise of legislative power.

3. **Counties:** COUNTY TREASURERS: MOTOR VEHICLES: FEES. Chapter 148, Laws 1929, *held* not in conflict with the provisions of section 2392, Comp. St. 1922, as amended by chapter 107, Laws 1929.
4. **Statutes:** TITLE. Where the title of an act fairly gives expression to the general subject-matter contained in the act, such act will not be held invalid as being broader than its title.

APPEAL from the district court for Douglas county: JAMES M. FITZGERALD and FRANCIS M. DINEEN, JUDGES. *Affirmed.*

G. E. La Violette, for appellants.

C. A. Sorensen, Attorney General, Henry J. Beal, Bryce Crawford, Jr., Baldrige, Dorsey & Baldrige, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and THOMSEN, District Judge.

DEAN, J.

Peter Mehrens and W. F. Poff, plaintiffs, began this suit in the district court for Douglas county, as residents and taxpayers therein, to enjoin Otto Bauman, as county treasurer of Douglas county, from retaining 25 cents which each applicant for a license to operate a motor vehicle is required to pay to the county treasurer for the service rendered pursuant to the provisions of section 6, chapter 148, Laws 1929. The court sustained the defendant's demurrer and thereupon the suit was dismissed. The plaintiffs, alleging error, have brought the record here to have it reviewed.

In 1929 the legislature enacted the act in question, whereby it became the duty of all county treasurers to examine applicants in their respective counties for such licenses and to issue a license to such applicants as were found by the treasurer qualified to receive a license. Section 6 of the act, so far as applicable here, follows:

"The county treasurer or each person appointed by the county treasurer to receive and approve applications for license shall be entitled to a fee of twenty-five cents for

the service rendered, to be paid by the applicant."

Plaintiffs contend that the above cited section 6 of chapter 148 is an attempt to repeal that part of chapter 107, Laws 1929, which provides: "All fees collected by the county treasurers shall be credited to the general fund of the county." Plaintiffs also insist that chapter 148 is unconstitutional and void in so far as it attempts to increase the salary of county treasurers, and that it is in violation of section 19, art. III of the Nebraska Constitution, which contains this provision:

"The legislature shall never grant any extra compensation to any public officer, agent, or servant after the services have been rendered nor to any contractor after the contract has been entered into, nor shall the compensation of any public officer, including any officer whose compensation is fixed by the legislature subsequent to the adoption hereof, be increased or diminished during his term of office."

It appears to us that the enactment of chapter 148, Laws 1929, fails to disclose a legislative intent to increase the salaries of county treasurers, as such officers, during their respective terms of office. And this for the obvious reason that the duties pertaining to the licensing of operators of motor vehicles are foreign to and do not at all come within the regular duties of county treasurers. The payment of the fee of 25 cents to county treasurers, as compensation for the issuance of each license by such officials, is not extra compensation for the performance of duties pertaining to their office, but is evidently compensation for new duties imposed upon such county treasurers and by such officers performed under a legislative mandate. Should it be seriously contended that the payment of the fee discussed herein is not a lawful exercise of legislative power? We do not think so.

We are not without support in our conclusion herein. In *Dunkel v. Hall County*, 89 Neb. 585, we held to the proposition that, if a sheriff is entitled to receive a salary of $1,500 per annum, as full compensation in the performance of all of his duties as sheriff, if he also performed the du-

ties of jailer he was entitled to the statutory compensation provided for the performance of other duties as jailer. And the decision in the *Dunkel* case was followed and reaffirmed in *Afflerbach v. York County,* 95 Neb. 611, and also in *Iler v. Merrick County,* 96 Neb. 114.

In a recognized authority the rule is clearly stated in this language:

"Where new duties are delegated by statute to a public officer which are without the scope or range of his office, and additional compensation is provided therefor, the statutory increase is not affected by a constitutional provision prohibiting any increase in the compensation of a public officer after his election or appointment." 21 A. L. R. 258.

And in another jurisdiction the rule was announced in this language: "For new and additional duties imposed on an office, an incumbent thereof may be awarded extra compensation without violating Const. 1901, secs. 118, 281, forbidding an increase of salary during term." *Tayloe v. Davis,* 212 Ala. 282.

We think the provisions contained in section 6, ch. 148, Laws 1929, are amply covered in the title by the language which expresses the object of the enactment of the act, in that such act is to "provide for the licensing of the operators thereof; to provide for the issue, suspension and revocation of such licenses," and that the language of the act does no violence to section 14, art. III of the Nebraska Constitution, which contains this familiar provision:

"No bill shall contain more than one subject, and the same shall be clearly expressed in the title. And no law shall be amended unless the new act contain the section or sections as amended, and the section or sections so amended shall be repealed."

The recognized rule appears to be that, where the title of an act fairly gives expression to the general subject-matter contained in the act, such act will not be held invalid as being broader than its title. "Whether or not a bill contains more than one subject is to be determined by examining the substance of the bill. Apparent duplicity in the title alone does not invalidate the act." *Van Horn v. State,* 46 Neb. 62.

The duties connected with the examination and licensing of operators of motor vehicles involve additional labor and responsibility by county treasurers outside of their duties as such county treasurers; so that, in view of the facts, the legislature, instead of creating a new office, saw fit to provide for the licensing of all operators of motor vehicles by the several county treasurers of the state.

The trial court did not err in dismissing the action. Finding no reversible error, the judgment is

AFFIRMED.

ROSE and THOMPSON, JJ., dissent.

ARTHUR J. WEAVER, GOVERNOR, APPELLANT, V. WILLIAM KOEHN ET AL., APPELLEES.

FILED JULY 9, 1930. No. 27424.

1. **Constitutional Law**: STATUTES: CONSTRUCTION. "It is elementary that it is not within the province of the courts to annul a legislative act unless its provisions so clearly contravene a provision of the fundamental law, or it is so clearly against public policy, that no other resort remains." *Abie State Bank v. Weaver*, 119 Neb. 153.
2. **Banks and Banking**: LEGISLATIVE APPROPRIATION: CONSTITUTIONALITY. The appropriation by the legislature of public money in the sum of $260,111.34, or in any sum, to reimburse depositors for losses sustained by such depositors in banks operated by the guaranty fund commission, *held* to be void and of no effect from the fact that it constitutes the taking of money belonging to one class to pay the claims of those of another class, and is in violation of the due process provision of the federal and state Constitutions.
3. **Statutes**: TITLE. The title of chapter 33, Laws 1929, in so far as it relates to the appropriation of $260,111.34 for reimbursement of depositors in banks, *held* insufficient to disclose the nature, purpose, and effect of the appropriation referred to in the body of the act.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JEFFERSON H. BROADY and ELWOOD B. CHAPPELL, JUDGES. *Affirmed.*

C. A. Sorensen, Attorney General, and *George W. Ayers,* for appellant.

Peterson & Devoe, amici curiæ.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY, and DAY, JJ.

DEAN, J.

Under the provisions of chapter 33, Laws 1929, the legislature appropriated $260,111.34, or so much thereof as should be necessary, to repay depositors in failed banks for such of their money as was deposited by them therein while the banks were closed and were being operated by the guaranty fund commission.

The Honorable Arthur J. Weaver, governor, and *ex officio* head of the department of trade and commerce, authorized the beginning of this suit to obtain a judicial determination, or a declaratory judgment, stating whether the legislative appropriation herein named is valid, and to obtain a judicial determination in respect of certain questions arising out of the proposed distribution of the money to the depositors.

The defendants William Koehn, Charles Behrendt, trustee, and A. H. Sissakian were depositors in one or more of the state banks during the time the banks were being operated by the commission and, as such depositors, they were made parties defendant. Each of the defendants filed a waiver of service of summons and entered a voluntary appearance in the suit and all joined in the prayer of plaintiff's petition herein that, upon a hearing being had, a declaratory judgment should be rendered by the court in respect of the validity of the appropriation by the legislature to reimburse depositors. The following allegation, in behalf of other of the depositors, also appears in plaintiff's petition, namely:

"There also are several thousands of other persons who have or claim to have some right as depositors to be reimbursed out of the money so appropriated. Some of them are unknown to the plaintiff and their number is so great

that it is not practical to get personal service upon them all, but the rights of each and all of them are affected as are the rights of the defendants herein specifically named by the answers to questions herein set forth."

The evidence was submitted and the suit was argued in the district court for Lancaster county before three district judges, namely, the Honorables Shepherd, Broady, and Chappell, sitting *en banc*, and the court, so organized, found, adjudged and decreed that the above named appropriation of $260,111.34, for the reimbursement of depositors in failed banks, was and is an unconstitutional proceeding and is therefore void and of no effect. The following reasons in support of their conclusion appear in the judgment rendered by the above named court, in respect of the invalidity of the appropriation in suit, namely:

"First, because it is offensive to the due process provision of the Constitution, and not for a public purpose; secondly, because the title to the act is insufficient to disclose the nature, purpose, and effect of said appropriation, and of the legislation resulting therein; and, thirdly, because said appropriation involves the taking of the property of the public generally for the relief of private persons without obligation on the part of the state, either legal or moral."

From the judgment so rendered, the plaintiff has appealed.

Chapter 33, Laws 1929, so far as applicable here, follows:

"There is hereby appropriated out of any money in the state treasury not otherwise appropriated the sum of $260,111.34, or so much thereof as may be necessary, to refund to depositors in banks closed by the department of trade and commerce such part of their deposits as was deposited in any of said banks by any of said depositors after said banks were closed and while operated by and in charge of the guaranty fund commission. The department of trade and commerce shall ascertain and determine which depositors are entitled to payment under this section and the amount to be paid to each of said depositors, said amount

being the amount of the claim as allowed by the district court against the guaranty fund less any payments made on said claim from any source. The auditor of public accounts is hereby authorized and directed to draw warrants on the state treasury for the amounts so determined upon the presentation of proper vouchers approved by the department of trade and commerce and the state treasurer shall pay the same out of moneys in the general fund not otherwise appropriated."

The judgment is clearly for affirmance. The banking business, as it relates to state banks in Nebraska, is recognized as being quasi-public in its transactions with the people generally, and particularly in respect of its transactions with depositors of money in such state banks. And this, of course, includes individuals and corporations and, in effect, all depositors of money therein. But the appropriation of money by the state, to reimburse depositors for losses sustained by them in failed banks, clearly appears to be the taking of money belonging to one class to pay the claims of those of another class. And this is in violation of the due process provision of the federal and state Constitutions. Clearly it has not yet come to pass that the state, in its supervision of the banking business; has become an eleemosynary institution.

In view of the facts as presented, it clearly appears to us that the losses of individual depositors in state banks cannot lawfully be made up nor paid from the appropriation of money that belongs to all of the people of the state. The deposits herein were merely business transactions between the bank and the depositor, and the public should not be made to pay for the losses that a depositor may have suffered in such transactions.

In *State v. Cornell*, 53 Neb. 556, it is said: "It is for the legislature in the first instance to decide what is and what is not a public purpose, but its determination of the question is not conclusive upon the courts." And in *Abie State Bank v. Weaver*, 119 Neb. 153, this language was used: "It is elementary that it is not within the province of the courts to annul a legislative act unless its provisions so

clearly contravene a provision of the fundamental law, or it is so clearly against public policy, that no other resort remains." In Gray, Limitations of Taxing Power, 123, sec. 170, the author says: "The state exists for the benefit of all; any devotion of its powers to merely private ends is such a perversion of its purpose and duties as to be utterly void; and it is the duty of the judicial agents of the state to protect the community from such perversion."

The title to chapter 33, Laws 1929, hereinbefore mentioned, follows:

"An act to make appropriations for the payment of claims filed against the state of Nebraska in the office of the auditor of public accounts, not heretofore paid, and for which no appropriation has been made; to make appropriations for the payment of miscellaneous claims presented to the legislature for which no appropriations have heretofore been made; to provide the manner in which certain money so appropriated shall be paid and expended and to declare an emergency."

We conclude that the title to the act, as above set forth, is insufficient to disclose the nature, purpose, and effect of the appropriation referred to in the body of the act, and is so clearly general in expression that it fails to apprise the reader of the nature of the appropriations to which reference is therein made.

The judgment of the learned trial judges is in all things

AFFIRMED.

DAVE D. ROWE ET AL., APPELLANTS, V. JOHN I. RAY, COUNTY SUPERINTENDENT, ET AL., APPELLEES.

FILED JULY 9, 1930. No. 27520.

1. **Constitutional Law: LEGISLATIVE FUNCTIONS: DELEGATION.** The legislature may not delegate legislative functions to private persons.
2. ———: ———: ———. The second proviso in section 6582, Comp. St. 1922, as amended by chapter 88, Laws 1929, is invalid because it attempts to delegate legislative functions to private persons.

3. Injunction: SCHOOL DISTRICTS: ORGANIZATION: BOARDS OF EDUCATION: POWERS. The board of education of school districts, created pursuant to the provisions of section 6582, Comp. St. 1922, is clothed with the power to bring actions to preserve and protect the property of the district from being unlawfully destroyed or diverted.

APPEAL from the district court for Dodge county: FREDERICK L. SPEAR, JUDGE. *Reversed, with directions.*

Abbott, Dunlap & Corbett and *J. F. Rohn,* for appellants.

E. L. Mahlin, Courtright, Sidner, Lee & Gunderson and *Fred H. Richards, Jr., contra.*

C. E. Sandall, Reeder & Reeder, Charles F. Stroman and *Patrick & Smith, amici curiæ.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

GOOD, J.

This is an action to enjoin the county superintendent of Dodge county from erecting a new school district out of territory lying outside of the boundaries of the city of Fremont but within the school district of Fremont. The trial court denied the injunction. Plaintiffs and interveners, joining with them, have appealed.

Before proceeding to a discussion of the questions involved, we deem it proper to call attention to the provisions of section 8608, Comp. St. 1922, which require a plaintiff to state in his petition the facts constituting his cause of action in ordinary and concise language, without repetition, and to the provisions of section 8615, Comp. St. 1922, which make a like requirement of defendant in setting forth his defense. Counsel for each of the parties have ignored these provisions. Their pleadings teem with a mass of irrelevant and immaterial matter. Such violations of the statutory rules of pleading needlessly tax the time and patience of the court.

This appeal requires us to determine the constitutionality of the second proviso in section 6582, Comp. St. 1922, as amended by chapter 88, Laws 1929, and whether plaintiffs

and interveners, joining with them, have a right in this proceeding to raise the constitutionality of such proviso.

Section 6582, Comp. St. 1922, prior to the amendment of 1929, provided for the organization of school districts, embraced within the corporate limits of cities and villages, together with territory outside of and adjacent to the boundaries of the city or village; provided that such district, when organized, should be a body corporate and possess the usual powers of a corporation for corporate purposes; that it might sue and be sued in its corporate name; and vested in such districts the title to the school buildings and other property, real and personal, owned by any school districts, within the corporate limits of such city or village. This section contained a proviso to the effect that any territory, not included in the corporate limits of the city or village, and containing territory or sufficient school children to constitute a school district, might, by petition, signed by a majority of the legal voters of said territory and by a majority of the board of education of the school district of the city or village, be by the county superintendent erected into a separate district. In 1929 the section was amended by adding another proviso in words following: "Provided, further, that whenever there shall be within such territory (meaning that part of the school district outside of the city or village) a tract comprising the equivalent of at least four sections of land contiguous, with an assessed valuation of not less than $200,000, and the original district shall, exclusive of such tract, contain not less than 2,000 inhabitants, and property of the assessed valuation of not less than $2,000,000, it shall be mandatory upon the county superintendent to erect such tract into a separate school district whenever there is filed for that purpose a petition signed by not less than three-fourths of the legal voters of such tract." Laws 1929, ch. 88.

Plaintiffs are the members of the board of education of the school district of Fremont in Dodge county. Certain resident taxpayers of such district intervened and joined with the plaintiffs in their demands, while other resident taxpayers of the territory, sought to be incorporated into

a new district, intervened and joined in the defense. The county superintendent took a neutral position and was willing to do whatever the court decided was his legal duty.

The school district of Fremont (hereinafter called the parent district) includes within its boundaries the city of Fremont, and approximately 6,500 acres of land adjacent thereto and entirely surrounding the city. A petition was presented to the county superintendent, demanding that a tract, therein described and lying outside the boundaries of Fremont, and which contained more than the equivalent of four sections of land and having an assessed valuation of more than $200,000, be erected into a separate school district. It is conceded that the petition was signed by more than 75 per cent. of the legal voters residing on the tract described in the petition, and also that the parent district, exclusive of the territory sought to be erected into a new district, has an assessed valuation in excess of $2,000,000 and a population of more than 2,000. The petition presented to the county superintendent complies with all the terms and conditions of the proviso. If said proviso is valid legislation, then it was the mandatory duty of the county superintendent to erect the territory into a new district and to call an election for the selection of school officers in such district.

The constitutionality of the proviso is attacked on many grounds. We need consider but one, namely: Does the proviso attempt to confer legislative authority upon private individuals, contrary to the provisions of section 1, art. II, and of section 1, art. III, of the Constitution?

It is a rule of general recognition that the formation of municipal corporations, such as counties, cities, villages, school districts, or other subdivisions, and the fixing of the boundaries of such municipal corporations are legislative functions. Among the decisions of this court which recognize this rule are: *City of Wahoo v. Dickinson,* 23 Neb. 426; *State v. Dimond,* 44 Neb. 154; *City of Hastings v. Hansen,* 44 Neb. 704; *Bisenius v. City of Randolph,* 82 Neb. 520; *Winkler v. City of Hastings,* 85 Neb. 212; *Elliott v. Wille,* on rehearing, 112 Neb. 86.

The legislature may enact general laws providing for the incorporation of municipal corporations, such as cities, towns, villages and school districts, and it may provide the conditions on which such municipal corporations may be created, and leave to some officer or official body the duty of determining whether the prescribed terms and conditions exist, and, when found to exist, the law directs the creation of the municipal corporation. The legislature may also prescribe and fix the terms and conditions on which such a law may come into operation. It may, by law, provide that two school districts may merge and become one, upon a vote of the electors of the two districts. It may and does authorize one city to annex an adjacent suburb or village upon a majority vote of the electors thereof, and by the consent of the municipal authorities of the larger city. In all such cases the legislative function has been performed. The legislature, in those cases, has fixed the terms and conditions on which an electorate, which is definite and certain, may determine whether the act of the legislature shall become operative. Does the proviso under consideration come within the rule thus announced? To determine this question, let us see what may be done under the proviso.

The parent district contains the equivalent of ten sections of land outside the boundaries of the city of Fremont. If the proviso is valid, then any number of individuals in the territory in that part of the district lying outside the city may, by petition, cause a new school district to be erected which will contain the equivalent of more than nine sections of land, and, by manipulation of the boundaries, can eliminate 95 per cent. of the voters residing on the nine sections, and who would be affected by such action. In fact, two or three electors, if they so desired, could compel the creation of a new district embracing the whole territory of the district outside the city, except very small tracts on which residences were situated, and which would comply with the terms of the proviso, and such new district might have no more than two or three families residing therein. They could leave to the parent district the territory within the city limits, with, possibly, 50 or 75 small detached

tracts, outside of the city and wholly disconnected from each other and the city, which would still belong to the parent district. The proviso does not comply with the rule that the legislature may prescribe the conditions upon which a district may be created and leave it to those who are interested and affected thereby to determine, by vote or petition, whether they will bring the law into operation and create a new district. It may be said that this is not the situation presented by the facts in this case, but it must be remembered that the validity of the act does not depend upon what has been done, but upon what the act authorizes and by what may be accomplished under it. *Elliott v. Wille, supra.* By the proviso in question the legislature has attempted to delegate to a few petitioners the power to fix the boundaries of a new district and to determine the electorate to pass upon its creation. Under the circumstances, there is a clear attempt to delegate to private individuals legislative functions.

That the legislature may not delegate to private persons a legislative function is abundantly established by authority. *Elliott v. Wille, supra;* 1 Cooley, Constitutional Limitations (8th ed.) p. 224 *et seq.;* 6 R. C. L. 164, sec. 165; 12 C. J. 842, sec. 327; *City of Hutchinson v. Leimbach,* 68 Kan. 37, 63 L. R. A. 630; *Commissioners of Wyandotte County v. Abbott,* 52 Kan. 148; *Morton v. Holes,* 17 N. Dak. 154; *Middleton v. Texas Power & Light Co.,* 178 S. W. (Tex. Civ. App.) 956; *Owensboro & N. R. Co. v. Todd,* 91 Ky. 175; *Fogg v. Union Bank,* 60 Tenn. 435, 437; *Shumway v. Bennett,* 29 Mich. 451; *Winters v. Hughes,* 3 Utah, 443.

Counsel for defendants have particularly stressed the case of *State v. Auer,* 197 Wis. 284. A reading of the opinion would lead one to believe that that court had reached a conclusion entirely opposite to the view herein expressed. An examination of the Wisconsin statute, however, discloses that it provides for a board of appeals, and that any person aggrieved by the formation of the district has the right to appeal to the board, and this official body is authorized to correct and change the boundaries of the district, if it finds that any injustice has been done. Thus, it will

be seen that the formation of a district was not left alone to self-selected petitioners to fix the boundaries and determine the electorate.

Counsel for defendants argue that plaintiffs, who constitute the board of education of the school district of Fremont, and other taxpayers of the district who have intervened and joined with them are not in a position to raise the question of the constitutionality of the proviso. The point is not well taken. The law vests in the board of education title to and power and control over all the school property within and belonging to the school district of Fremont. If any one should attempt to interfere with this property, to destroy or carry it away, it certainly would be the legal duty of the board of education to protect and preserve the property belonging to the district. In the instant case, the proviso is void, as we have already found, and any attempt, on the part of the proposed new school district, to take any of the property of the parent district would be without authority and a wrongful act. The plaintiffs are clothed with authority to protect the rights of the school property belonging to the parent district, and have a right to maintain this action.

Other questions are presented and argued, but the conclusion which we have reached on those already discussed renders it unnecessary to consider them.

It follows that any attempt, on the part of the county superintendent, to erect a new district out of the territory comprised within the parent district is without authority.

The judgment of the district court is reversed and the cause remanded, with directions to enter judgment for plaintiffs in conformity with this opinion.

REVERSED.

CHARLES LUEDEKE, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED JULY 9, 1930. No. 27295.

1. **Railroads**: RIGHT OF WAY. The right of way is the property of a railroad and the use of such property is within its control,

except in a way incidental to its function as a common carrier in which the public has an interest.

2. ———: ———: LEASE: EXEMPTION. A railroad company, being under no legal obligation to grant to any one the privilege of constructing and operating a building or equipment upon its right of way, may grant the privilege by contract exempting it from damage resulting from its negligence associated with such construction and operation.

3. ———: ———: ———: ———. A provision in a lease permitting the installation of an unloading device upon a railroad right of way, which exempts the railroad from liability for damages resulting from the installation, maintenance, presence or use of such device, does not free the railroad from liability in a suit to recover damages directly resulting from the negligence of the company in unreasonably blocking a crossing, thereby delaying the fire department on its way to a fire.

4. ———: BLOCKING CROSSING: LIABILITY. A railroad company is liable for the damage directly resulting from its negligence in blocking a street crossing with a train for an unreasonable length of time, with knowledge of a nearby fire and the approach of a fire truck and desire of the firemen to cross its tracks; and to justify its effort to protect the train from fire it must proceed without unreasonable delay.

5. Witnesses: COMPETENCY: FIREMAN. A volunteer fireman, who has had years of experience with fires, is competent to testify as to the result and effect upon said fire of the use of the fire apparatus. This is more especially true, since at the time the testimony was given the fireman had the experience of this very fire. The weight of the testimony is of course for the jury.

APPEAL from the district court for Stanton county: CHARLES H. STEWART, JUDGE. *Affirmed.*

Wymer Dressler, R. D. Neely and *H. J. Lutz,* for appellant.

Cowan & Grady and *Fay H. Pollock, contra.*

Heard before ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ.

DAY, J.

This action was brought to recover damages which the plaintiff claims resulted by reason of the negligence of the defendant in obstructing certain streets with a freight train and delaying the fire department in reaching the

plaintiff's property which was burning. The defendant appeals to this court from a judgment in favor of the plaintiff.

The defendant sets up as an affirmative defense that the plaintiff, by written agreement, had assumed all risk of loss by fire to the property destroyed; that he had released the defendant from all such claims and had agreed to indemnify it for any loss. This fire was not started by the operation of defendant's train. It was started by an explosion in the building which was burned, located 150 feet distant from the spur track and not on the right of way. The fire occurred about noon, September 13, 1924, and completely destroyed the building used in connection with a gasoline plant at Stanton, Nebraska.

The written agreement under which the defendant claims freedom from liability is one granting plaintiff the right to construct upon the right of way an unloading device to unload and convey by pipe line gasoline from the cars to the gasoline plant. The provision of this agreement under which exemption is claimed is this:

"The licensee assumes and agrees to pay for all loss or damage to property, and injury to or death of persons, including costs and expenses incident thereto, caused by the construction, installation, maintenance, presence or use of said pipe or pipes or said unloading device, or by reason of any failure to lock, maintain or remove the movable connections as hereinbefore provided or by their presence or use upon the property of the railway company, or by failure of the licensee or the officers, agents or employees of the licensee to abide by or comply with any of the conditions of this license; and the licensee further assumes all loss and damage to said pipe or pipes or unloading device resulting from any act or default of the railway company, its officers, agents, servants or employees, or from the operation of said railroad, whether negligent or otherwise, together with the cost of all repairs and renewals to said pipe or pipes and unloading device; and the said licensee hereby forever indemnifies the railway company against and agrees

to save it harmless from all liability for any such loss, damage, injury, death, costs and expenses."

At the outset, it is necessary for us to determine whether the defendant is exempt from liability by the terms of this agreement. Similar questions have been frequently presented to the courts. The great weight of authority sustains the proposition that a railroad company, being under no legal obligation to grant to any one the privilege of constructing and operating a building or equipment upon its right of way, may grant the privilege by contract exempting it from damage resulting from its negligence associated with such construction and operation. *James Quirk Milling Co. v. Minneapolis & St. L. R. Co.*, 98 Minn. 22; *Checkley v. Illinois C. R. Co.*, 257 Ill. 491, 44 L. R. A. n. s. 1127. The right of way is the property of a railroad and the use of such property is within its control, except in a way incidental to its function as a common carrier in which the public has an interest. *Missouri P. R. Co. v. Nebraska*, 217 U. S. 196; *Chicago, B. & Q. R. Co. v. State*, 50 Neb. 399. In most of the cases cited, the property was located upon leased premises and the fire was started by the operation of the trains of the company. In this case, the property was not located on the leased premises, and the fire was not started by the defendant. We have not discovered any case directly in point and none has been cited by counsel. The plaintiff's cause of action is based upon the negligence of the defendant, in that it negligently blocked a crossing and thereby delayed the fire department from reaching plaintiff's burning building, which delay resulted in damage to the plaintiff. Does the contract between the parties, heretofore quoted, free the defendant from liability in this case? It has been held, where a spur was constructed under such a contract exempting the company from liability on account of its use, that the company was liable for damages resulting from negligence in running a train through an open switch into cars of gasoline and setting fire to them. The court distinguished this case from others in that the damage did not arise from the operation of the side-track for the benefit of the gasoline company, but was

caused by the negligence of the engineer in running the train through an open switch. *Standard Oil Co. v. Payne,* 220 Mich. 663. It seems the principle announced therein is applicable to the instant case. The damage in this case was not caused by the use of the unloading device. The negligence alleged by plaintiff had no connection with the "installation, maintenance, presence or use of said pipe or pipes or said unloading device." True, the defendant contends that the fire occurred in the operation and use of the device, but the action is not brought to recover damage as a result of the fire, but only for the damage resulting from the fire due to the negligence of the defendant in delaying the arrival of the fire department by blocking the crossing with a train for an unreasonable time. *Standard Oil Co. v. Payne, supra,* is not in conflict with the general authority, it merely considers the application and construction of the provisions of the contract to the circumstances of the case, and holds that the contract did not, under the facts, free the defendant from liability. Where a contract, as in this case, is against a common-law liability, it should be strictly construed and not given an enforcement beyond that required by such construction. 13 C. J. 521. The parties in this case did not contemplate an exemption of liability for negligence not associated with the occupancy of the leased premises. A provision in a lease permitting the installation of an unloading device upon a railroad right of way, which exempts the railroad from liability for damages resulting from the installation, maintenance, presence or use of such device, does not free the railroad from liability in a suit to recover damages directly resulting from the negligence of the company in unreasonably blocking a crossing, thereby delaying the fire department on its way to a fire.

Since the contract in this case does not free the railroad from liability for the alleged negligence, let us consider the rights and duties of the railroad in such a case. In this state a railroad company may properly leave its cars standing on a highway crossing for short periods when necessary for the reasonable conduct of its business. But to

leave such cars in or upon the highway longer than necessary for such purpose is negligence. *Chicago, B. & Q. R. Co. v. Roberts,* 3 Neb. (Unof.) 425. In order to hold the company responsible, it must appear that the negligence in blocking the crossing was the proximate cause of the damage. *Omaha & R. V. R. Co. v. Talbot,* 48 Neb. 627. Trainmen in charge of trains and the public have taken widely divergent views as to the length of time a crossing may reasonably be blocked, and have frequently been notoriously and wantonly indifferent to the right of the public to use such crossings. The record in this case discloses a contemptuous disregard for the rights of the public to use this crossing under circumstances of the most urgent necessity. An uncontrolled and hostile fire was burning a building. Such a fire was a menace to other property and yet the crew in charge of this train, if the plaintiff's evidence is true, took an unreasonable time to pull their train away from the crossing. Such conduct as this has resulted in legislative enactments, under the police power, limiting the time a crossing might be blocked. Stanton had such an ordinance which limited the time to five minutes which a train might block a street crossing. This ordinance was introduced in evidence. We have repeatedly held that the violation of such an ordinance is to be considered by the jury as evidence of negligence.

But, aside from a violation of the ordinance, the question of negligence is to be determined from the circumstances of the case. In this case, the train was standing on the crossing, cut to permit traffic upon the street. The train crew knew about the fire. A chemical truck, which was useless at this fire, crossed the track, whereupon the crew closed the gap and stopped the hose truck, which was following it. This truck was delayed from 5 to 22 minutes, according to various witnesses. In *Hanlon Drydock & Shipbuilding Co. v. Southern P. Co.,* 92 Cal. App. 230, it is said: "There is ample authority for the rule that the unexplained blockading of a street crossing by a railroad train is negligence on the part of the railroad company. *Southern R. Co. v. Floyd,* 99 Miss. 519; *Central of Georgia R. Co. v.*

Chambers, 183 Ala. 155; *Chicago, B. & Q. R. Co. v. Roberts*, 3 Neb. (Unof.) 425; *Matoza v. Southern P. Co.*, 59 Cal. App. 636, 640; *Houren v. Chicago, M. & St. P. R. Co.*, 236 Ill. 620, 20 L. R. A. n. s. 1110, 127 Am. St. Rep. 309." The defendant attempts to explain the blocking of the crossing by the fact that the crew thought the train was in danger from the fire and, pursuant to the orders of the dispatcher, were moving it away from the fire to save it. Even conceding this point, which seems to be sound and finds support in the books, it would still remain a question of fact as to whether the action of the train crew was reasonable under the circumstances. In this case, the testimony of the plaintiff's witness was that it required from 5 to 17 minutes to pull this train over the crossing after it was closed. The jury believed the plaintiff's witnesses and found that the company did not act reasonably in this particular. The evidence upon this point is in conflict, and the rule is that this court will not interfere with the finding of a jury based upon such evidence. A railroad is liable for the damage directly resulting from its negligence in blocking a street crossing with a train for an unreasonable length of time, with knowledge of a nearby fire and the approach of a fire truck and desire of firemen to cross its tracks; and to justify its effort to protect the train from fire it must proceed without unreasonable delay.

Finally, the most serious question presented by this record is whether the plaintiff proved damages directly caused by the negligence of the defendant. Objection was made to the testimony of a volunteer fireman, in which he stated in his opinion what part of plaintiff's property could have been saved, if the hose truck had not been delayed. The fire in this case seems to have been started by an explosion of dry gas. After the explosion, the fire in the building is not shown by the evidence to have been a gasoline fire. The defendant relies upon *Eclipse Lumber Co. v. Davis*, 196 Ia. 1349, and *Hartford Fire Ins. Co. v. Mellon*, 206 Ia. 182. In these cases the court held that the delay caused by the train blocking the crossing was not established as the proximate cause of the damage. As stated in these cases, the

question of proximate cause is well settled, but the difficulty lies in applying the rule to the facts in a given case. In these cases, the hose was not usable when the truck arrived at the fire and it had to return to the barn to get more hose. Obviously the delay caused by the railroad company was not the proximate cause of the damage. We are not in a position to question the rules announced therein, but a similar application to this case is untenable. The fire in this case is minutely described by many witnesses, including the firemen, who were there shortly after its inception. A volunteer fireman, who has had years of experience with fires, is competent to testify as to the result and effect upon said fire of the use of the fire apparatus. This is more especially true, since at the time the testimony was given the fireman had the experience of this very fire. The weight of the testimony is of course for the jury. There is some conflict in the testimony as to the physical appearance of the fire, but it fairly appears that, at the time the chemical truck, which was useless, appeared, it was inside of one portion of the building; that, when the fire was extinguished in the building by total consumption, the gasoline fire at the tanks was easily extinguished by stopping the flow of gas. Without quoting portions of the testimony, suffice it to say that we have examined the entire record in this case, and find the evidence sufficient to sustain the finding of the jury as to the amount of the damage caused by the negligence of the railroad company in blocking the crossing.

We have examined the record and, in addition to the reasons heretofore stated, we find no prejudicial error. The judgment of the district court is

AFFIRMED.

L. J. GARVER ET AL., APPELLANTS, V. CITY OF HUMBOLDT, APPELLEE.

FILED JULY 9, 1930. No. 27081.

1. **Municipal Corporations**: POWERS. Powers conferred upon municipal boards by legislative charter will not be extended beyond the plain import of the language used therein.
2. ———: ———: CONSTRUCTION. Statutes empowering municipal boards to perform certain functions will be strictly construed, and all doubt will be resolved against the exercise of the power, rather than in favor of it.
3. ———: ———: STREET IMPROVEMENT. Chapter 42, Laws 1927, amending section 4283, Comp. St. 1922, as amended by chapter 138, Laws 1923, construed, and *held* not to confer authority upon city councils to improve any street unless such street at the time actually connects with the state highway system of the state of Nebraska.
4. ———: ———. Under the law of this state, a city council cannot, by enactment of an ordinance, extend its powers beyond the limits prescribed in its charter.

APPEAL from the district court for Richardson county: JAMES T. BEGLEY, JUDGE. *Reversed.*

F. A. Hebenstreit and *J. E. Leyda*, for appellants.

Fred C. Foster and *C. F. Reavis, contra.*

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and DAY, JJ., and CARTER and CHASE, District Judges.

CHASE, District Judge.

This is an appeal from the judgment of the trial court affirming the action of the city council of the city of Humboldt in levying special assessments against the property involved herein for the purpose of paying for street improvement. The plaintiffs challenge the power of the city council under its municipal charter to levy such assessments. The case was tried below upon the record made before the city council and the same record is presented to this court for review. For convenience we will herein refer to appellants as the plaintiffs, and to the city of Humboldt as defendant.

The facts, so far as they are material to the consideration of the case, are as follows: The city of Humboldt, Nebraska, is admitted by the parties to be a city of the second class, governed by a legislative charter applicable to such cities. It appears that the city council determined upon a plan of street improvement in said city under chapter 42, Laws 1927, and to that end on the 7th day of February, 1928, passed an ordinance creating by its terms "Street Improvement District No. 2." Said district includes all that portion of Central avenue from the south line of the alley south of Fifth street to the north line of Tenth street and Nemaha street from the north line of Fourth street to the north line of Tenth street. This ordinance declares said streets to be main thoroughfares that connect with and form a part of the state highway system of the state of Nebraska; that in addition to the above streets said ordinance includes that portion of Sixth street from the west line of Central avenue to the east line of Nemaha street. Central avenue and Nemaha street run north and south, and Sixth street runs east and west, and that portion described in the ordinance is but two blocks in length, which connect Central avenue and Nemaha street.

The plaintiffs are property owners who have property abutting on or adjacent to Central avenue. On January 1, 1929, the city council, sitting as a board of equalization, levied an assessment against the property of plaintiffs for the purpose of paying plaintiffs' proportionate share of the cost of such improvement. The plaintiffs, by appropriate objection, challenged the jurisdiction and power of the city council to sit as a board of equalization and levy such special assessment and to make any levy of taxes against their respective properties for the cost of such improvement. The record further discloses that a quarter of a mile north of the north boundary of the corporate limits of Humboldt, Nebraska, is located State Highway No. 4, running east and west, which has been improved and is a part of the state highway system of the state of Nebraska; that Central avenue, at the time of the improvement thereof, as indicated

by these proceedings, did not extend, as such, farther north than Tenth street, while the record does disclose that there was a narrow way or lane extending from Tenth street north to Highway No. 4, but was not used generally for travel prior to the city's improvement of Central avenue under these proceedings; and this lane was not in the corporate limits of the city of Humboldt and not one of the public thoroughfares of said city.

The question presented by the record involves an interpretation of chapter 42, Laws 1927, amending section 4283, Comp. St. 1922, as amended by chapter 138, Laws 1923.

It will be noted that chapter 42 seems to provide three different methods of procedure for street improvement in cities of the second class. Under the first method the property owners affected must, by petition, initiate the action of the council. Under the second method the council is empowered to initiate such action by ordinance creating an improvement district and shall give notice of the creation of such district by publication in a newspaper. It is apparent from the record that the city council did not comply with either of the first two methods provided by the legislature. Therefore, if the action of the council is to be supported by the charter it must be under the third method provided thereby. Under the third subdivision the council may initiate action by a three-fourths vote, without petition, by enacting an ordinance providing for the improvement of any main thoroughfare that connects with or forms a part of the state highway system. If the action of the council can be supported by the city charter as to the improvement of both Central avenue and Nemaha street its power must be derived from the procedure prescribed by the third method.

It will be necessary to interpret the meaning of the language used by the legislature as applicable to such a situation. The statute provides that the council, after taking the initiatory steps, may order the work done, or order the work to be done upon *"any main thoroughfare that connects with or forms a part of the state highway system."* It appears from the record of these proceedings that both

Nemaha street and Central avenue have been improved; that the property owners adjacent to and abutting upon Nemaha street filed no protest and prosecuted no error from the levy of special assessments by the city council for the payment of such improvement. To our mind the record presents but a single question for determination; which is, whether or not the legislature, by chapter 42, has conferred power upon municipalities to gravel and improve one of its streets unless such street connects with and forms a part of the state highway system. From the undisputed evidence disclosed by this record Central avenue, as a public thoroughfare of the city of Humboldt, did not extend to or connect with State Highway No. 4 at the time of the passage of the ordinance in question.

The defendant cites *Salsbury v. City of Lincoln*, 117 Neb. 465, but a careful reading of that case will clearly distinguish it from the instant one. In the *Salsbury* case the issue was whether or not the city council of the city of Lincoln had acted wisely and justly in the creation of a paving district, admitting that it had the power to create such district. The court held, having the power to create such district, courts would not inquire into the expediency or necessity for such action. It was expressly held that judicial inquiry will be directed as to power and not expediency. The precise question here for judicial determination is one of power, which was not the question involved in the *Salsbury* case. It is apparent from a reasonable interpretation of the language used that the legislature did not intend to clothe the city council with power to improve any thoroughfares of the city under this section, but only such thoroughfares as connect with and form a part of the state highway system.

Municipal corporations are purely entities of legislative creation. They do not exist independent of some action of the legislative department of government bringing them into being. All the powers which they can possess are derived from the creator. Unlike natural persons they can exercise no power except such as has been expressly delegated to them, or such as may be inferred from some ex-

press delegated power essential to give effect to that power. Therefore the question of judicial concern, as presented by this record, is not one of legislative function, but one of power under the charter which provides for the creation of a city of this class. The canons of construction applicable to municipal charters adopted by the courts generally are too well settled to make any lengthy argument necessary. Courts almost universally hold that legislative charters wherein cities are empowered to perform certain acts or functions are construed with a greater degree of strictness than ordinary civil statutes, and the rule in Nebraska is that they shall be strictly construed. Their authority to perform municipal acts will not be extended beyond the plain import of the language of the charter. From the facts disclosed by the record, which are undisputed, it is apparent that Central avenue did not connect with or form a part of the state highway system of the state of Nebraska prior to the passage of the ordinance in question and the city council for that reason did not have the power to improve this street under the provisions of chapter 42, Laws 1927, amending section 4283, Comp. St. 1922, as amended by chapter 138, Laws 1923, and a declaration by the city council by ordinance that this street is a part of the state highway system cannot operate to extend the charter.

For reasons herein stated, the judgment is reversed and the cause remanded.

REVERSED.

OLIVER P. BURROWS ET AL., APPELLANTS, V. J. E. KEEBAUGH ET AL., APPELLEES.

FILED JULY 9, 1930. No. 27137.

1. Ordinance No. 125, as set forth in the record, viewed in connection with the testimony and proceedings of the council, contains a sufficiently clear title and is valid.
2. Municipal Contracts: PAVING CONTRACTS. Neither resolution of necessity nor establishment of grade are jurisdictional prerequisites to letting of paving contract.

3. ———: COUNCIL: SPECIAL MEETINGS: NOTICE. Notice of special meetings of council is not required as to member out of state and physically unable to be present if notified.
4. **Remonstrants** may withdraw their names at any time before petition is submitted to the board or council, or afterwards, before it is acted upon, for sufficient cause.
5. **Appeal in Equity:** TRIAL DE NOVO. When an action in equity is appealed, wherein review of some or all of the findings of fact of the district court is asked by the appellant, it is the duty of this court to try the issues *de novo* and reach an independent conclusion without reference to the findings of the district court. Comp. St. 1922, sec. 9150. And when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying.

APPEAL from the district court for Scotts Bluff county: EDWARD F. CARTER, JUDGE. *Affirmed.*

J. E. Porter, for appellants.

Raymond & Fitzgerald and *F. J. Reed, contra.*

Heard before GOSS, C. J., DEAN, GOOD and EBERLY, JJ., and RHOADES, SPEAR and TEWELL, District Judges.

RHOADES, District Judge.

This is an action brought in the district court for Scotts Bluff county to restrain the defendants and appellees from proceeding with work for public improvements in the city of Mitchell, a city of the second class, under a contract, and to have all proceedings relative thereto decreed to be void. Certain owners of real estate within the improvement district sought and obtained leave to intervene, and they also resisted the application for an injunction upon substantially the same grounds as did the city, and further asked for a mandatory injunction requiring the council to proceed with the proposed public improvements. The court below dissolved, vacated and set aside the temporary injunction, and denied a permanent injunction and dismissed plaintiffs' petition. The court below further dismissed the petition of the interveners without prejudice, there being no sufficient evidence that the defendants herein would not

forthwith proceed to make the improvements. From the order of the court below, the plaintiffs appeal.

Vigorous objection is made by plaintiffs to practically every step taken in the procedure by the city council. However, the more important ones are disposed of in this opinion. Plaintiffs insist that ordinance No. 125, under which the city council proceeded, is void for the reason that no ordinance shall contain any subject which is not clearly expressed in its title. After carefully reading said ordinance No. 125, in connection with the clerk's records relative to its passage, we believe that the title of the said ordinance fully and fairly sets out every subject covered in the ordinance. There is no requirement that all details be expressed in the title. *Morgan v. State*, 64 Neb. 369. It is clearly manifest from a study of the record and the proceedings of the council in this case that the council sought to, and succeeded in repealing ordinance No. 124, and enacting and passing ordinance No. 125.

Appellants further contend that ordinance No. 125 is void for the reason that there is no finding by the council that the proposed improvements are necessary. The statute, section 4283, Comp. St. 1922, as amended by chapter 42, Laws 1927, as far as it relates to this matter, provides: "Whenever the governing body shall deem it necessary to make any of the improvements hereinbefore named, said governing body shall by ordinance create paving, graveling, or other improvement district or districts, and after the passage, approval, and publication of such ordinance, shall publish notice of the creation of any such district or districts." It will be noted that the statute does not say, "they shall declare the necessity by ordinance," but they "shall by ordinance create." It would not seem in the present case that the determination of necessity is at all jurisdictional. Even in the face of the city charter of Omaha, in the case of *Portsmouth Savings Bank v. City of Omaha*, 67 Neb. 50, where this question was involved, the court said: "As to the requirement of a declaration that the work is necessary, an examination of section 110 of the city charter would seem to indicate that it never was in-

tended by the legislature that this declaration should be jurisdictional." From section 110, as it appears in the opinion, we find: "'Whenever any of the improvements herein named, to wit, paving, * * * singly or all together, shall be declared necessary by the mayor and city council' * * * it seems a quite different provision from that, for instance, of the drainage act, by which the commissioners are required to make a finding as to the necessity of the work." If the statute requires a finding and resolution of necessity for an improvement, it would seem to be jurisdictional. Section 4283 makes no such requirement.

The plaintiffs further contend that the ordinance should provide for the establishment of a permanent grade. We are unable to agree with this contention in view of our holding in *Schreifer v. City of Auburn,* 110 Neb. 179, in which it is stated: "The city council of a city of the second class is not required to establish by ordinance a grade upon a street forming a part of a paving district as a condition precedent to the establishment of such a district." This proposition is in 44 C. J. 193, 571; *Knowles v. Seale,* 64 Cal. 377; *Kershaw v. City of Willamina,* 119 Or. 543; *Allen v. City of Davenport,* 107 Ia. 90; *Schreifer v. City of Auburn, supra.*

Plaintiffs further contend that the special meeting of the council on November 1, 1928, was void for the reason that notice was not given to all the councilmen. We readily concede that the proceedings of a city council would be void if one of the councilmen, while within the reach of the place of the meeting and able to attend, was given no notice, and the council could not justify its actions merely by reason of there being a quorum present, or upon the theory that the absentee's vote would not have changed the proceedings, for, in that case, it could well be contended that the people were entitled to have their representative present and to council with the body in their municipal proceedings. However, in the present case, it was stipulated and agreed by and between the parties: "That on the 1st day of November, 1928, councilman Max Weekley was confined to a hospital in Wheatland, Wyom-

ing, where he had been for more than 30 days prior thereto, and was not physically able at said time to receive any notice of any meeting nor to attend any meeting of any kind in the city of Mitchell, and that said Max Weekley during all of said time had and maintained a home within the city of Mitchell which was his principal place of residence in the state of Nebraska." We think the stipulation that councilman Weekley was confined to a hospital and physically unable to receive a notice or to attend a meeting excuses the service of notice. Under the circumstances and stipulations, any notice to councilman Weekley would have been an idle gesture.

The statute governing special meetings of the council of a city of the second class is section 4167, Comp. St. 1922, and is as follows: "The mayor or any three councilmen shall have power to call special meetings of the city council, the object of which shall be submitted to the council in writing, and the call and object, as well as the disposition thereof, shall be entered upon the journal by the clerk." See 43 C. J. 499; *Rafferty v. Town Council of Clermont,* 180 Ia. 1391; *Gale v. City of Moscow,* 15 Idaho, 332; *Nelson v. City of South Omaha,* 84 Neb. 434; 2 Dillon, Municipal Corporations (5th ed.) sec. 534.

There are other contentions of the plaintiffs, and, while ably argued, are more or less technical in their nature. For instance, plaintiffs argue that the second subdivision of the 1927 amendment to section 4283, Comp. St. 1922, provides: "If a majority of the resident owners of the property directly abutting on the street * * * to be improved shall file with the city clerk, * * * within 20 days after the first publication of said notice, written objections to the creation of such district, * * * said improvement shall not be made as provided in said ordinance, but said ordinance shall be repealed." By reference to exhibit 4, it will be noted that the notice was first published October 11, and the 20-day limit for filing protest would expire October 31. Theoretically, at least, it could not be determined by the city council until the 31st day of October had expired just how many *bona fide* remonstrants had

signed the remonstrance. It is well settled that an objector may lawfully withdraw his name from a remonstrance at any time before the time for filing has expired, and many of the cases hold that they may withdraw their name at any time before the remonstrance has been acted upon by the council or other tribunal. It was the condition of the record of the clerk's office on October 31 that determines the status of the remonstrance. Clearly the council could not repeal the ordinance before the time for filing of remonstrances had expired. 44 C. J. 239, 257; *City of Sedalia v. Montgomery,* 109 Mo. App. 197; *Wilkinson v. City of Lincoln,* 105 Neb. 752; *State v. Nemaha County,* 10 Neb. 32; *Salt Lake & U. R. Co. v. Payson,* 66 Utah, 521.

There are other contentions of the plaintiffs, which, in our opinion, are not controlling. When an action in equity is appealed, wherein review of some or all of the findings of fact of the district court is asked by the appellant, it is the duty of this court to try the issues *de novo* and reach an independent conclusion without reference to the findings of the district court. Comp. St. 1922, sec. 9150. "And when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying." *Magill v. Magill,* 114 Neb. 636.

The judgment of the lower court is

AFFIRMED.

WINFIELD M. ELMEN, RELATOR, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT ET AL., RESPONDENTS: BOARD OF REGENTS OF THE UNIVERSITY, INTERVENER.

FILED JULY 10, 1930. No. 27412.

1. **Constitutional Law.** The Constitution of a state is not regarded as a grant but rather as a restriction on legislative power, but it is to be regarded as a grant to other departments of state government.
2. **Taxation.** The taxing power vested in the legislature is without limit, except such as may be prescribed by the Constitution.

3. **Constitutional Law**: POWER OF COURTS. Courts can enforce only those limitations which the Constitution imposes, and not those implied restrictions which, resting on theory only, the people have been satisfied to leave to the judgment, patriotism, and sense of justice of their representatives.
4. ———: INTERPRETATION. The words and terms of a constitutional provision are to be interpreted and understood in their most natural and obvious meaning, unless the subject indicates or the text suggests that they have been used in a technical sense, and while the Constitution, as amended, must be construed as a whole, still where the words employed in a constitutional provision are plain, direct, and unambiguous, no interpretation is necessary to ascertain their meaning, for courts may not supply what they deem unwise omissions, or add words which substantially add to or take from the Constitution as framed.
5. ———: POWERS OF GOVERNOR. The governor is the chief executive of the commonwealth and of the executive department of the state government, but in submitting to the legislature his recommendations under the provisions of section 7, art. IV of the Constitution of Nebraska, and in acting on bills submitted to him for his approval or rejection, he is engaged in the performance of a legislative duty specifically enjoined upon him by the Constitution, and as such is subject to the restriction contained in section 1, art. II of the Constitution of Nebraska, which denies him the right to exercise any power properly belonging to the legislative or judicial departments except as "hereinafter expressly directed or permitted."
6. **Evidence**: JUDICIAL NOTICE. This court takes judicial notice of the proceedings of the constitutional convention and of the journals of the house of representatives and of the senate.
7. **Constitutional Law**: CONSTRUCTION. Legislative construction of a constitutional provision, although not necessarily conclusive upon the judicial department, is entitled to great weight when deliberately given, and especially when adhered to consistently for a considerable period of time, and this is particularly true when an identical construction has also been placed thereon for a like period of time by the highest officers of the executive department of the government and by the administrative officers who may be affected thereby.
8. **Statutes**: APPROPRIATIONS. The provisions of section 7, art. IV of the Constitution of Nebraska, as amended, are substantially complied with when a bill to which they apply, containing items in excess of the amounts recommended in the governor's budget message, is duly adopted by a three-fifths vote

of each house of the legislature taken when and as prescribed by section 13, art. III of the Constitution of Nebraska; no separate three-fifths vote on each separate item thus increased being required thereby or by section 7, art. IV of the Constitution of Nebraska.

9. **Constitutional Law**: GENERAL AND SPECIAL PROVISIONS. When general and special provisions of a state Constitution are in conflict, the special provisions should be given effect to the extent of their scope, leaving the general provisions to control when the special provisions do not apply.

10. **Statutes**: APPROPRIATIONS. Accordingly as to appropriations for "all departments, institutions and agencies of the state" made in excess of the recommendations contained in the governor's budget message by three-fifths vote of each house of the legislature, such excess so approved by such three-fifths vote "shall not be subject to veto by the governor."

11. **Equity**: LEGISLATIVE APPROPRIATIONS. No plain, certain, and adequate remedy at law existing for the wrong suffered by intervener, it is entitled to resort to equity for relief, and in view of the facts in the instant case possesses the necessary capacity to maintain this action.

Original proceeding by Winfield M. Elmen against the State Board of Equalization and Assessment and others, in which the Board of Regents of the University of Nebraska intervened, to determine the validity of certain legislative appropriation items. *Decree upholding validity of appropriation.*

Winfield M. Elmen, pro se.

C. A. Sorensen, Attorney General, George W. Ayers and *Clifford L. Rein*, for respondents.

Henry H. Foster, for intervener.

Peterson & Devoe, amici curiæ.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

EBERLY, J.

This is a proceeding in equity instituted in this court by a taxpayer, as relator, against the state board of equalization and assessment, of which Honorable Arthur J. Wea-

ver, governor, Honorable Frank Marsh, secretary of state, Honorable L. B. Johnson, state auditor, Honorable W. M. Stebbins, state treasurer, and Honorable Harry W. Scott, state tax commissioner, are members, and joining Honorable L. B. Johnson in his capacity as state auditor, respondents.

The petition set forth in appropriate language the ultimate facts upon which relief is claimed, the gist of which is:

That, pursuant to the Constitution, there was submitted to the forty-fifth session of the legislature of Nebraska by the chief executive a complete itemized budget of the financial requirements of all departments, institutions and agencies of the state. A copy of this budget message, attached as an exhibit, constitutes a part of this pleading.

That thereafter appropriation bills carrying the identical items contained in the budget message were duly introduced in the house of representatives and there designated as house rolls 280 and 281. That, "notwithstanding the limitations of the Constitution of the state of Nebraska prohibiting the appropriation of money in excess of the recommendation contained in said budget unless by a three-fifths vote of each house of the legislature, the two houses of the legislature attached to house roll 280 certain amendments without such three-fifths vote of each house, and thereby undertook to increase the appropriations shown by said amended bill." That house roll 280, thus amended, was finally passed and adopted, by concurrence in the conference committee report thereon, "by an affirmative vote of 32 members of the senate, no negative vote being cast," and was likewise passed and adopted by the house of representatives "by an affirmative vote * * * of 82, with no negative votes cast, and with 28 (18?) members absent," but that no separate vote by roll call was had and recorded on the respective separate increases in the respective items as recommended by the governor in his message. A copy of house roll 280, with amendments made thereto, is also attached to and forms a part of the petition.

We take judicial notice of the fact that house roll 280, thus amended, was presented to the governor for approval or rejection on the 24th day of April, 1929, at 11:57 a. m. and immediately thereafter on said day both the senate and house of representatives adjourned *sine die*.

The relator further alleges that house roll 280 containing such increases thus passed was filed in the office of the secretary of state of Nebraska, together with the veto message of the governor, which in paragraphs 1 to 14, inclusive, disapproved certain items thereof, some wholly and some in part only, thus leaving certain increases made by legislative amendments in full force and effect. The relator also alleges that no separate vote was had or recorded in either house of the legislature on the respective separate increases contained in house roll 280 as finally adopted, as required by the terms of the Constitution, and that therefore no increase above and in excess of the recommendations of the governor were in fact and in law made; that the state auditor and the state board of equalization and assessment have heretofore erroneously determined that the governor's veto was valid and effective as to the items of house roll 280 to which it relates, but notwithstanding the modification occasioned by such veto house roll 280 as finally adopted and thus modified still contains increases of items over and above the recommendations of the governor's budget message, none of which were constitutionally enacted, and which the governor had no power to validate and are therefore void, and which said state board has heretofore determined constitutes a proper basis for assessment, and this board will, unless enjoined, determine the tax levy for the present year on that basis.

The board of regents, a corporation, intervened in the proceeding, and in its petition filed in the case adopts and amplifies the ultimate facts pleaded by the plaintiff, but dissents from the plaintiff's interpretation of the constitutional provisions relating thereto. It is alleged in substance in its behalf that appropriations for the benefit of the intervener as recommended in the budget message were by the legislature lawfully increased over and above the bud-

get recommendations of the governor; that a separate three-fifths vote on each separate item of increase is not a requirement of the Nebraska Constitution, but that house roll 280, after having been duly amended, received more than three-fifths vote in each house at the time of its final passage and adoption, and that thereby the constitutional mandate applicable to the situation was that these provisions having been adopted by more than three-fifths vote in each house were within the protection of section 7, art. IV of the Constitution of Nebraska, which provides that "such excess (constituting increases of budget recommendations) so approved by a three-fifths vote shall not be subject to veto by the governor;" and that therefore the governor's veto as to the items of appropriation contained in said bill in favor of the intervener was without legal force and effect and the items of appropriation contained in house roll 280 thus adopted are each and all valid and existing appropriations, notwithstanding the attempted veto.

The respondents joined issue by a general demurrer directed to the petition of relator based on the ground that his petition does not state facts sufficient to state a cause of action, and likewise by a demurrer to intervener's petition based on the same ground, and to which was added an additional reason that "the said intervener has not legal capacity to sue in the manner and form and for the purposes in its said petition of intervention stated."

For convenience we will classify items of appropriation in dispute herein as classes A, B, and C, and will refer to the communication which accompanied house roll 280 when it was returned by the governor and filed in the office of the secretary of state within five days after the adjournment of the legislature as the "veto message."

First, class A will include items of appropriation contained in house roll 280 as finally adopted, for which the governor's budget message carried no recommendations, but which were added by the legislature, totaling the sum of $165,000, and which were each wholly and separately disapproved in paragraphs 1, 2, 3, 4, 6, 12, and 14 of the veto message.

Class B relates to items of appropriation in house roll 280, for each of which the governor's budget message contained definite recommendations as to amount, but which amounts thus recommended were each increased by the legislature, so that the sums, including the increases thus made, total $5,415,000. These items are each, in part only, separately disapproved by the governor's veto message in paragraphs 5, 7, 8, 9, 10, 11, and 13 thereof. As to all save the seventh paragraph, the disapproval or veto extends to and coincides with the increase over and above the budget recommendations. As to paragraph 7, a portion only of the increase of the items of appropriations therein referred to thus made is disapproved. The remainder of the increase is impliedly, though not expressly, approved. By this veto of these separate items a reduction of $330,500 is sought to be effected.

Class C refers to items of appropriations contained in house roll 280 which in effect increased the items of maintenance of the board of control by $112,500. This the governor, for reasons stated, expressly approved, or rather stated, "I deem it necessary to allow this increase made by the legislature, to stand."

The basic foundation of relator's contention is the proposition that section 7, art. IV of the Constitution, as amended in 1919-1920, requires the governor to fix the maximum of the budget items in his budget message; and that an increase can be made only by a three-fifths vote of the houses of the legislature, and that the three-fifths vote thereby required is a separate three-fifths vote on each item of increase; and that a three-fifths vote had in each house on final passage and adoption of the bill therein is insufficient under the terms of the constitutional provision referred to. It is conceded by all parties in the instant case that, while the final adoption of house roll 280 was by a substantially unanimous vote, there was "no separate three-fifths record vote on each item of increase."

The respondents, it seems, accept in part the construction thus contended for, but do not agree as to the legal result of failing to have a separate three-fifths vote on each

item of increase, and contend for the validity of the appropriations as reduced by the governor's veto.

Intervener's position is that the words of the Constitution referred to are plain, that no resort to implication is necessary, and where in both houses a "whole bill" has been passed and adopted by a three-fifths record vote, necessarily each of the parts thereof has been thus passed and adopted.

It appears that the constitutional convention of 1919-1920 framed an amendment to section 7, art. IV of the Constitution of 1875, then in force, which was submitted to and adopted by the electors, and there was thereby included in our present fundamental law the following: "At the commencement of each regular session (the governor) shall present, by message, a complete itemized budget of the financial requirements of all departments, institutions and agencies of the state for the ensuing biennium. * * * No appropriations shall be made in excess of the recommendation contained in said budget unless by three-fifths vote of each house of the legislature, and such excess so approved by a three-fifths vote shall not be subject to veto by the governor."

In this connection it is to be remembered that a principle of constitutional construction early adopted by the courts and almost universally observed is: "The (state) Constitution is a limitation upon the powers of the legislative department of the government; but it is to be regarded as a grant of powers to the other departments. Neither the executive nor the judiciary, therefore, can exercise any authority or power, except such as is clearly granted by the Constitution." *Field v. The People,* 3 Ill. 79.

Indeed, this court, in harmony with the controlling principles just stated, early announced the doctrine, which has ever since been the uniform holding of this tribunal: "The (state) Constitution is not a grant but a restriction of legislative power." *Magneau v. City of Fremont,* 30 Neb. 843; *State v. Moores,* 55 Neb. 480.

And as applied to the subject of this lawsuit: "The taxing power vested in the legislature is without limit, except such as may be prescribed by the Constitution itself." *State*

v. Lancaster County, 4 Neb. 537; *State v. Dodge County,* 8 Neb. 124; *Shaw v. State,* 17 Neb. 334; *Darst v. Griffin,* 31 Neb. 668; *State v. Lansing,* 46 Neb. 514, 530; *Mercantile Incorporating Co. v. Junkin,* 85 Neb. 561; *Whitla v. Connor,* 114 Neb. 526.

And we have also announced the doctrine: "The courts can enforce only those limitations which the Constitution imposes, and not those implied restrictions which, resting on theory only, the people have been satisfied to leave to the judgment, patriotism, and sense of justice of their representatives." *State v. Lancaster County,* 4 Neb. 537.

Indeed, a careful consideration of the briefs and arguments of counsel at the bar discloses no serious controversy as to the principles of construction applicable to the matter here for determination, viz., "In the main, the general principles governing the construction of statutes apply also to the construction of Constitutions." 12 C. J. 699; *Mercantile Incorporating Co. v. Junkin,* 85 Neb. 561. The words and terms of a constitutional provision, like those of a statute, are to be interpreted and understood in their most natural and obvious meaning, unless the subject indicates or the text suggests that they have been used in a technical sense. *Hamilton Nat. Bank v. American Loan & Trust Co.,* 66 Neb. 67. Also, "Courts may not supply what they deem unwise omissions, nor add words which substantially add to or take from the Constitution as framed." 12 C. J. 707, notes 21, 33, and 34; 25 R. C. L. 963, note 4; *State v. Reneau,* 75 Neb. 1; *Siren v. State,* 78 Neb. 778; *State v. School District,* 99 Neb. 338; *In re Estate of Bayer,* 116 Neb. 670. Also, "The Constitution as amended must be construed as a whole." *Hooper Telephone Co. v. Nebraska Telephone Co.,* 96 Neb. 245. And, "Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning; a mere reading will suffice." *Stoppert v. Nierle,* 45 Neb. 105; *State v. Heupel,* 114 Neb. 797. And, finally, in the construction of a statute, "No sentence, clause or word should be rejected as meaningless or superfluous, if it can be avoided." *Hagen-*

buck v. Reed, 3 Neb. 17; *State v. City of Lincoln,* 101 Neb. 57.

But, in addition to the principles of construction just enumerated, which appear to be accepted without controversy by the parties to this litigation, it seems we are justified in taking judicial notice of proceedings in the constitutional convention and of the contents of the journals of the house of representatives and of the senate. *State v. Frank,* 60 Neb. 327; *State v. Frank,* 61 Neb. 679; *State v. Dean,* 84 Neb. 344. And while we regard legislative construction, although not necessarily conclusive upon the judicial department, as entitled to great weight when deliberately given, and especially when adhered to consistently for a considerable period of time (*Jackson v. Washington County,* 34 Neb. 680; *Missouri P. R. Co. v. State,* 248 U. S. 276), we are also inclined to the view: "The construction placed upon a statute (or constitutional provision) by the officers whose duty it is to execute it is entitled to great consideration, especially if such construction has been made by the highest officers of the executive department of the government, or has been observed and acted upon for many years, and such construction should not be disregarded or overturned unless it is clearly erroneous." 36 Cyc. 1140; *State v. Holcomb,* 46 Neb. 88; *State v. Sheldon,* 78 Neb. 552; *Rohrer v. Hastings Brewing Co.,* 83 Neb. 111; *State v. Bryan,* 112 Neb. 692.

Observing the order of time, it appears that the controlling budget provision before us was first discussed in the constitutional convention of 1919-1920. In this discussion by those who framed and submitted it to the electorate for ratification, it appears that the members of the convention were fully advised of the fact apparently conceded in its debates that, under its provisions, "three-fifths of the members of the house and three-fifths of the members of the senate could vote any amount of money they might see fit," and that as to increases of budget recommendations made by a three-fifths vote "the veto power of the governor will not apply." Proceedings of the Constitutional Convention 1919-1920, p. 2078.

In the address to the people submitted as explanatory of the proposed amendments and authorized as such by the constitutional convention itself appears in substance the following with reference to this budget amendment: "The difference is that under the budget the governor must announce his position before the legislature acts, while, under the present Constitution, the governor may veto after the legislature acts." And the assurance was expressly given that "the proposal does not increase the powers of the governor." Proceedings of the Constitutional Convention 1919-1920, p. 2843. And it is also to be noted in this connection that the constitutional convention also submitted an amendment to section 13, art. III of the Constitution, which in terms provided: "No amendment to any bill by one house shall be concurred in by the other nor shall the report of any conference committee as to any bill be adopted by either house except by the assent of the same number of members as is required for the passage of the original bill taken by yeas and nays entered upon the journal."

We are indebted to the suffrage of the people for the adoption of all amendments submitted and indeed for the adoption of the original Constitution which such amendments changed. From this fact it is patent that, where the language employed is plain, the courts should accord to it the meaning which obviously would be accepted by the layman. In the instant case, taking into consideration that section 11, art. III of our present Constitution, is as it was in the Constitution of 1875, unchanged, and provides among other things that "Each house shall keep a journal of proceedings * * * and the yeas and nays of the members on any question, shall at the desire of any two of them be entered on the journal. All votes in either house shall be *viva voce*." That section 13, art. III of the Constitution, which was submitted by the constitutional convention of 1919-1920, as adopted, provides: "No law shall be enacted except by bill. No bill shall be passed by the legislature unless by the assent of a majority of all members elected to each house of the legislature, and the question upon final passage shall be taken immediately upon its last reading

and the yeas and nays shall be entered upon the journal. No amendment to any bill by one house shall be concurred in by the other nor shall the report of any conference committee as to any bill be adopted by either house except by the assent of the same number of members as is required for the passage of the original bill taken by yeas and nays entered upon the journal." And it further appears in section 7, art. IV of the Constitution, that there is no express provision therein contained that there shall be a separate three-fifths record vote on each item of increase, but merely that "no appropriations shall be made in excess of the recommendation contained in such budget unless by three-fifths vote." What logical basis is afforded by the foregoing which would justify any conclusion on the part of the elector whose vote adopted the provision in question save and except that, where budget appropriations when adopted as a result of concurrence in a conference committee report, such procedural action by the legislature would be governed and controlled by the terms of the constitutional amendment adopted at the same election which provided: "No amendment to any bill by one house shall be concurred in by the other nor shall the report of any conference committee as to any bill be adopted by either house except by the assent of the *same number of members as is required for the passage of the original bill* taken by yeas and nays entered upon the journal." Const. art. III, sec. 13. (Italics ours.) Indeed, subsequent events disclose that the construction suggested was adopted by both the legislative and executive departments of the state government. It appears that thereafter the governors of this state then in office, in compliance with the budget provisions referred to, submitted to the forty-first, forty-second, forty-third, forty-fourth, and forty-fifth sessions of the legislature of the state of Nebraska complete itemized budgets of the financial requirements of all departments, institutions, and agencies of the state for the ensuing biennium; that at each of the sessions referred to, upon due consideration by each of the separate houses, as provided by the Constitution, certain of these items were increased in excess of the budget recommendations; that in

none of these instances was there a separate record vote on each item of increase. In all of them the legislation was finally adopted by three-fifths vote in the manner provided by section 13, art. III of the Constitution. It further appears that each of the chief executives concerned, except our present governor, not only accepted the appropriations thus made as having been adopted in full compliance with the constitutional provisions, but also in no manner challenged the validity or regularity of legislative procedure connected therewith.

This has also been true as to all administrative officers designated by law to deal therewith and disburse the same. In view of responsibilities involved, this is particularly striking when the acts of the state auditors are considered. The Constitution of Nebraska and laws made pursuant thereto expressly provide that, upon the adjournment of each session of the legislature, the then state auditor shall determine the aggregate amount of the appropriations made and prepare or cause to be prepared a certified statement of all appropriations made by such legislature, also a full statement of the expense of such legislative sessions, and publish the same in the manner provided by law in one of the three daily papers having the largest circulation in the state. Thus this officer, in compliance with the duties prescribed by the Constitution and statutes, necessarily, not only determined the validity of the legislative appropriation acts in question, but in a public manner advised the electors and taxpayers of this state of the determination thus made, and as auditor thereafter, in connection with the secretary of state, duly allows the claims payable therefrom. He thereby necessarily determined that there was, not only a valid claim against the state, but also a valid appropriation from which the same could be paid. Const. art. VIII, sec. 9; Comp. St. 1922, sec. 3157; *State v. Wallichs*, 14 Neb. 439; *State v. Moore*, 37 Neb. 507. Indeed, it cannot be said that the present governor of Nebraska has in fact denied the validity of the appropriations thus made, for he permitted certain of these increases "to stand." A careful consideration of the budget amendment without reference

to the other provisions of the Constitution of the state confirms us in the opinion that the language employed is "plain, direct, and unambiguous," and that no interpretation is necessary to ascertain its meaning. We are also convinced that, construed as a limitation upon legislative power, the words of this amendment are binding in what they fail to express as well as that which they expressly enjoin, and this court may not supply what it might deem unwise omissions, or add words which substantially add to or take from the Constitution as framed and adopted. There being no limitation expressed to the effect that there must be a separate three-fifths record vote on each budget item increased, we are not justified in extending the force and effect of this amendment beyond the precise words it contains.

This conclusion is also supported by the consistent and continued interpretation which the legislative branch of this state has given the provisions under consideration and which was in entire harmony with the construction given it by all of the executive and administrative officers of this state, save and except the contentions first made by the respondents in this case after the adjournment, *sine die*, of the forty-fifth session of the legislature. It is to be remembered that one of the great objects of government is security and peace, which includes stability, by which is meant, not only absence of revolution, but also the certainty of rights of legal as well as political relations. As already suggested, we find no substantial question of doubt involved in the constitutional provision here controlling. But even if we assume that such a question is actually presented, the conclusion announced would still remain the same. Thompson, J., of this tribunal in the case of *State v. Bryan*, 112 Neb. 692, applicable alike to constitutional provisions as well as statutes, states the rule as follows: "That construction of a statute of doubtful meaning given it by those whose duty it is to enforce it, and which construction the legislature has by its continued non-interference for a number of years acquiesced in, will be approved, unless as thus construed it contravenes some provision of the Constitution, or is clearly wrong." In support of this there is cited

in the opinion the case of *State v. Sheldon,* 79 Neb. 455, in which the rule is announced: "When a statute has for nearly 40 years been practically construed by the officers whose duty it is to enforce it, and has during that time been several times reenacted by the legislature in substantially the same terms, such construction will be regarded as adopted by the legislature, although the language of the statute would indicate a different meaning." So, too, this court is committed to the doctrine that "The governor is a part of the lawmaking power, and, in acting on bills presented to him for his approval or rejection, he is engaged in the performance of a legislative duty enjoined upon him by the Constitution." *Weis v. Ashley,* 59 Neb. 494; *State v. Junkin,* 79 Neb. 532. It is also patent that in this regard the effect of the amendment of 1919-1920, now forming a part of section 7, art. IV of the Constitution, is to modify, but not extend or increase, the legislative function and duties with which the chief executive is invested. Its provisions therefore are fairly within the purview of section 1, art. II of the Constitution, and governed by the rule of construction there announced: "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, *and no person* or collection of persons *being one of these departments, shall exercise any power properly belonging to either of the others except as hereinafter expressly directed or permitted.*" (Italics ours.)

This court, therefore, is unanimously of the opinion that the legislative practice in the passage of the budget bills disclosed in the present record, wherein items recommended by the chief executive have been increased in excess of the recommendations thus made, is in substantial compliance with limitations expressed in section 7, art. IV of the Constitution of Nebraska.

Having determined that house roll 280 was constitutionally enacted, the relator's contention may not be sustained, and the field of controversy as between the intervener and the respondents is narrowed to the single question: Are increases properly made in a budget bill subject to the veto of the chief executive?

The history of the provisions relating thereto indicate the negative. In the first Constitution (1866) of this state section 19, art. II, executive, conferred on the governor a veto power almost identical with that conferred on the president by the Constitution of the United States. It applied alike to all legislation and under it there could be no veto of an item in an appropriation bill. In the Constitution of 1875 the veto power is defined in section 15, art. V, which with certain amendments continued the provisions of the Constitution of 1866 in force, but adds thereto a provision empowering the governor to disapprove any items of appropriation contained in bills passed by the legislature. The amendment of section 7, art. IV of the Constitution, which we have heretofore discussed and interpreted, is limited by its express terms in its application to "the financial requirements of all departments, institutions, and agencies of the state." It is manifest that there are certain appropriations that are not within but outside of the limitations thus expressed. As to the appropriations made pursuant to the budget and passed, but which have been amended by the legislature so as to exceed the recommendations contained in the budget message and such excess approved by three-fifths vote, this amendment provides that such appropriations "shall not be subject to veto by the governor."

The rule of construction applicable to the situation is: "When general and special provisions of a Constitution are in conflict, the special provisions should be given effect to the extent of their scope, leaving the general provisions to control in cases where the special provisions do not apply." 12 C. J. 709; *People v. Cassiday,* 50 Colo. 503; *State v. Harris,* 77 Ohio St. 481; *City of San Antonio v. Toepperwein,* 104 Tex. 43.

In the instant case, the more general provision is section 15, art. IV of the Constitution, which deals in general terms with the governor's veto power. The more particular provision is section 7, art. IV of the Constitution, which deals with one restricted class of appropriations. Section 7, art. IV, is a later provision than section 15, art. IV. Section 7, together with statutes in aid thereof, sets up a complete

system of dealing with the financial requirements of all departments, institutions, and agencies of the state from the initiatory recommendations of a department or institutional head or board to final enactment of the appropriations. Indeed, giving full effect to the provision of the amendment adopted in 1920 as a "special provision" should put the whole controversy at rest as to classes A, B and C, as heretofore defined, for it includes within it the words "shall not be subject to veto by the governor."

We are confirmed in the view therefore that all the provisions of house roll 280 in controversy which in effect increase the amount of the recommendations contained in the governor's budget message having been properly passed under the mandate of the Constitution of Nebraska, as amended, "shall not be subject to veto by the governor." It follows therefore that, as to these items therein disapproved, the attempted veto is unauthorized, wholly void, and of no effect, and the provisions of house roll 280 as finally passed by the senate and the house remain in law in full force and effect wholly unaffected thereby.

But the right to prosecute these proceedings in equity is challenged by the respondents on the ground that a statutory right of review forms a complete remedy at law. They cite in support of their contention the concluding portion of section 5901, Comp. St. 1922, which provides: "From any final decision of the state board of equalization and assessment, any person, county or municipality affected thereby may prosecute a writ of error to the supreme court." However, this provision must be construed in connection with sections 5898 to 5904, inclusive, Comp. St. 1922, relating to the state board of equalization and assessment; section 28, art. IV of the Constitution, and section 5827, Comp. St. 1922. It will be observed that section 5901, Comp. St. 1922, is wholly devoted to the subject of the equalization of assessments and procedure prescribed therefor, including provisions for review of the final determinations therein made. It would seem, in view of all the provisions referred to, that the concluding portion of section 5901, Comp. St. 1922, must be limited to proceedings contemplated and reg-

ulated by this section. The determination of the "rate of taxation" is not one of the subjects treated in section 5901, Comp. St. 1922. The subsequent section, 5904, which was amended by chapter 173, Laws 1927, provides: "The state board shall make a levy of state taxes for the general fund throughout the state after having determined the rate of taxation upon all taxable property in the state, except intangible property otherwise taxed, in the following manner: The levy shall be based on the valuation of all taxable property as of record in the office of the tax commissioner for the year in which the levy is made. The board shall determine the fixed appropriations from the general fund from the statement of the auditor of public accounts as provided by section 3157," Comp. St. 1922.

Section 3157, Comp. St. 1922, in the light of the constitutional mandate relating thereto, requires the auditor of public accounts within sixty days after the adjournment of a session of the legislature to prepare "a certified statement of all appropriations whatever made" by such session of the legislature, "and also a full statement of the expenses of such legislative session, specifying the amount of each item and to whom and for what paid." This statement, the statute directs, shall be published in one of the three daily papers having the largest circulation in the state. The statute before us presents two questions involving serious doubt: First, is not the review provided for limited to final decisions of the state board of equalization and assessment in matters pertaining to the equalization of assessments? and, second, can the right of review have any application whatever to the matter of determining "the rate of taxation upon all taxable property in the state?" Particularly is this a problem in view of the fact that by the terms of the statute the state board is limited in its determination of the "fixed appropriations from the general fund from the statement of the auditor of public accounts as provided by section 3157."

It is true that a copy of the statement of the auditor forms a part of the petition of the relator, and from it we may determine that the state auditor in 1929 certified, so

far as the appropriations in controversy in this action are concerned, the amounts and items of appropriation as reduced by the governor's veto, and to that extent has erred. This error, it appears, adversely affected certain appropriations, as we have determined herein, lawfully made for the benefit of the university of Nebraska. There was therefore a present existing legal wrong at the time intervener filed his pleadings herein. This wrong intervener is entitled to have remedied, and for that purpose to have the certified "statement of the auditor of public accounts as provided by section 3157," Comp. St. 1922, and such other necessary proceedings connected therewith or based thereon corrected to conform to the facts and law here determined. Intervener is also entitled to have the "rate of taxation" determined by the board of equalization form a proper consideration of this corrected certificate and to have the rate of taxation fixed at such amount as will provide funds sufficient to cover all sums legally appropriated for the benefit of the university of Nebraska. In connection with this it may be noted that whether the "statement of the auditor of public accounts" referred to are by the terms of the statute to be considered as *prima facie,* or as conclusive on the board of equalization and assessment, we do not determine. So far as the parties to this litigation are concerned, however, the ultimate facts required to be shown by the auditor having been adjudicated upon demurrer of the respondents, it would seem that so far as the present case is concerned the certified statements of the auditor made in compliance with the findings of fact and law herein would be conclusive upon the respondents as the board of equalization in determining "the fixed appropriations from the general fund." It would follow that no plain, certain, and adequate remedy at law exists, and intervener is entitled to proceed in equity for appropriate relief. We are also of the opinion that in consideration of the issues involved, intervener possesses the necessary capacity to maintain this action. The respondents' demurrer to intervener's petition must be and is therefore overruled, and intervener is entitled to such other relief as herein indicated.

In view, however, of the nature of the proceedings before us, the commendable motives, and the perfect good faith of all parties hereto, no further formal order will be entered herein at this time, provided, however, in the event of any default, failure, or refusal of the respondents or any of them to accord intervener the rights to which it is entitled under the determination herein made, permission is granted to file appropriate supplemental proceedings herein.

HERMAN TOMBRINK ET AL., APPELLANTS, V. SARPY COUNTY ET AL., APPELLEES.

FILED JULY 11, 1930. No. 27395.

1. **Equity**: LACHES. Laches constituting a defense to a suit in equity depends upon the particular facts of each case.
2. ———: ———. In equity, unreasonable delay, independently of any statute of limitations, may operate as a bar to relief, if prejudicial to adverse party.
3. **Highways**: PAVING: SPECIAL ASSESSMENTS: LACHES. Inexcusable delay of nearly four years in bringing a suit in equity against a county to cancel special assessments to pay for paving a highway may bar such relief, where plaintiffs petitioned for the pavement and, prior to such suit, made no objection to the issuance of county bonds to pay therefor or to the making of the improvement or to the levying of the assessments

APPEAL from the district court for Sarpy county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

S. L. Winters, for appellants.

Patrick & Smith, William P. Nolan and *E. S. Nickerson, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

ROSE, J.

This is a suit in equity to cancel special assessments on lands of plaintiffs to pay for highway paving in Sarpy county. Defendants are the county of Sarpy and the county treasurer. The prayer for equitable relief is based on

pleas that the legislative act under which the improvement was made was unconstitutional and void as class and special legislation, and that the entire burden of taxation was imposed in one levy, instead of 15 annual assessments, as required by statute. The trial court found the issues in favor of defendants and dismissed the suit. Plaintiffs appealed.

On the ground of laches alone plaintiffs were not entitled to equitable relief and it is therefore unnecessary to consider other questions presented on appeal. The improvement district was regularly organized. The highway was improved and the assessments made under the act of 1923. Laws 1923, ch. 128. May 28, 1923, the owners of the lands upon which the assessments in controversy were levied petitioned for the paving under the legislation now assailed by them as void. Pursuant to the petition for the paving, the highway was improved; county bonds to pay for the work were issued and sold; lands of plaintiffs were benefited by the paving; special assessments upon their property and upon other property in the paving district were levied and entered upon the tax lists of the county. Defendants mean to collect annually only one-fifteenth of the total amount levied. May 18, 1925, the county board, after previous notice, met to hear complaints and objections respecting apportionment of benefits and the making of special assessments. Though the petition for the paving was dated May 28, 1923, and the assessments levied May 25, 1925, plaintiffs did not begin this suit until May 24, 1929. In the meantime, without objection, the improvement was made and bonds to pay therefor were isssued and sold and assessments were levied upon all property subject thereto in the paving district. Property owners generally acquiesced in the proceedings and in the assessments. Before proceeding in equity, plaintiffs waited without protest until the improvement was completed; until their property had been benefited; until the burden of assessments had fallen alike upon all the assessable property in the paving district; until the county had sold its bonds, which are still outstanding. Laches is manifest on the face of the petition and is

shown throughout the record. Judge Irvine, in an article on Equity, stated general rules as follows:

"The question of laches is to be decided upon the particular circumstances of each case."

"Unreasonable delay alone, independently of any statute of limitations, will often operate as a bar to relief." 16 Cyc. 152.

These rules of equity are abundantly supported by precedent and in Nebraska are enforceable under chancery power conferred by the Constitution. Const. art. V. sec. 9; *Hawley v. Von Lanken*, 75 Neb. 597; *Harrison v. Rice*, 78 Neb. 654, 659. The undisputed facts showing laches are peculiarly applicable to the present suit. The delay was long and inexcusable. Plaintiffs helped to set in motion the proceedings which they now assail as void and they seek equitable relief therefrom after sleeping on their rights for nearly four years and after the county issued and sold in good faith bonds to pay for the highway improvement made at their behest. The suit was properly dismissed on the ground of laches alone.

AFFIRMED.

CHARLES E. WIGINGTON, APPELLANT, V. OCEAN ACCIDENT & GUARANTEE CORPORATION, APPELLEE.

FILED JULY 11, 1930. No. 27204.

1. Insurance: POLICY: CONSTRUCTION. Where a corporation, organized for the purpose of selling its commodities to the general public, ordinarily furnished its salesmen with automobiles to use in the furtherance of its business, and where one of its salesmen, at times, when such corporation was not in position to furnish him with one of its automobiles, used, as such salesman, an automobile owned and controlled by his wife, and where such corporation, through one of its agents, applied to an insurance company for an automobile liability policy to cover numerous of such corporation's automobiles and included therein such automobile of the wife without designating it as such, and where the policy is issued without notice on the part of the insurance company of the true ownership of the automobile, so that the coverage included the aforesaid automobile owned by the wife, such coverage under the policy is limited to

the automobiles owned by the corporation, save and except the automobile owned by the wife, and to it only during the time it is in such corporation's use.

2. ———: ———: ———. Further, where such automobile of the wife is by her loaned for a private mission to a third party, who is not a member of her household and in no manner connected with the above corporation or its business, such third party does not by reason thereof become the "assured" or an "additional assured" under the aforesaid policy.

3. ———: ———: ———. In such case, where the third party, while on such private mission, injures a person, and the latter sues and obtains judgment against the third party for damages, and where such third party is without property, the injured person cannot recover on his judgment, by way of garnishment proceedings, against the insurance company.

4. ———: ESTOPPEL. Under this record, the estoppel contended for is found to be without application.

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Affirmed.*

Sidney W. Smith and *Lower & Sheehan,* for appellant.

Kennedy, Holland, De Lacy & McLaughlin, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

THOMPSON, J.

In the trial court Wigington, appellant herein, sought recovery against appellee, the Ocean Accident & Guarantee Corporation, Limited, hereinafter called insurance company, on a judgment obtained against one Crawford, basing such claimed right of recovery against the insurance company on the provisions of a certain automobile liability policy of insurance issued by it to the Omaha Paint & Glass Company, a corporation doing business in the city of Omaha, hereinafter designated paint company. Judgment having been entered in favor of the insurance company, Wigington appeals.

In addition to the above, it may be stated that at the times here involved Charles S. McGill was the vice-president and city salesman of the paint company; that his wife was the owner of a Buick automobile, the license for which was is-

sued in her name, and the engine number thereof was 1034193; that McGill in the course of his employment at times used this automobile, which latter when not so in use was kept at the home of the McGills, and was used by them as a family car; that prior to the date of the accident, which formed the basis of the action in which the judgment was rendered against Crawford, the paint company, through one of its agents, applied to the insurance company for an automobile liability policy of insurance to cover numerous automobiles, including the above Buick, giving complete description of the cars, together with their respective engine numbers, for which coverage was sought, which description and numbers were to be, and were, specifically designated in the policy issued. However, it may be said that there is nothing in the policy which in any manner indicates that any one other than the paint company owned or claimed to own any of the automobiles so insured. Further, the insurance company did not learn of the McGill ownership of this Buick automobile until after the accident happened. Then, the policy contains the positive statement that the automobiles insured were owned by the paint company. As we view this insurance contract, at best, the insurance coverage thereunder is limited to the property of the paint company, save and except the Buick automobile here in question, and to it only during the time it is in the company's use.

After the issuance of the policy, the aforementioned Crawford, in no manner connected with the McGill household or with the paint company, went to Mrs. McGill and asked her if he could have her automobile to take his mother to a banquet, a picture show, and then to her home. Mrs. McGill answering that he could, he took the car, without having obtained permission of the assured, and while on this mission he met with the accident in question, in which the above mentioned Wigington was seriously injured. Afterwards Crawford was sued by Wigington, who recovered judgment against him for the sum of $8,000. It might be well to state that in such action, so far as the record discloses, the insurance policy was not mentioned in the plead-

ings or at the trial. Thereafter Wigington caused execution to be issued, which, after diligent investigation, was, by the officer entrusted therewith, returned "no property found," and Wigington procured garnishee summons to issue against the insurance company, which latter proceeding forms the gravamen of the instant action.

It is urged by appellant, in substance, that under the terms of the policy Crawford was the "assured" or an "additional assured," and in either case appellant, by virtue of his judgment against Crawford, is entitled to recover thereon of the insurance company.

As to this contention: Considering the record in its entirety, we are impelled to conclude that Crawford, under the terms of the policy, was not the "assured," and neither was he an "additional assured," and therefore appellant is not entitled to such recovery.

It is further contended, however, that the insurance company, by reason of the position that it took in the trial of the case of Wigington v. Crawford, is estopped from asserting or attempting to prove that Crawford was not an "assured." With reference to this: The record discloses in such original action that the insurance company was not made a party, the sole and only parties to that action being Wigington, plaintiff, and Crawford and Charles S. McGill, defendants; that separate answers were filed for each of such defendants, and that at the close of the plaintiff's evidence the court directed a verdict in favor of McGill, and the case proceeded to trial to a jury as to Crawford, and verdict was returned in favor of Wigington for the sum of $8,000, on which judgment was rendered against Crawford. It also appears that the insurance company did hire and pay the attorney who defended Crawford, as well as the attorney who represented McGill. Further, it appears that at the trial of the instant case there was introduced in evidence a stipulation signed by Crawford, which contained certain provisos reflecting the situation of the parties to that action, and also the insurance company's relation thereto. Such stipulation contains the following agreement:

"Now therefore, the undersigned, Ralph Crawford, agrees

with the said insurance company that it may be authorized to employ attorneys to defend him and to file pleadings on his behalf, it being understood that the said Ralph Crawford has no insurance and that by the fact of the said company employing counsel to defend him, no inference as to any additional liability is to be had, and it being understood that in the event judgment is obtained against the said Ralph Crawford, the said Ocean Accident & Guarantee Corporation, Limited, shall not be obligated to pay any part thereof, and shall not be obligated to appeal said judgment, it being understood that this defense offered by the said insurance company is a gratuity because of the fact that they are also defending the said Charles S. McGill."

By these disclosures it is apparent that all but Wigington had notice of the fact that the insurance company was furnishing the attorney for Crawford, and the manner thereof as indicated by the last above quotation.

Under the terms of the policy it was made the duty of the insurance company to appear and defend McGill in the case of Wigington v. Crawford, to the extent of his interest under the policy, even if such interest is limited as hereinbefore suggested, and this notwithstanding such case should be found to be groundless as to him.

As to the insurance company's interference by way of furnishing an attorney in behalf of Crawford, he not having been an "assured," such interference could not give rise to an estoppel as herein contended.

All claimed errors presented have had our consideration.

The judgment of the trial court is

AFFIRMED.

LEWIS W. SHEPARD, APPELLEE, V. HENRY D. HAMAKER ET AL., APPELLANTS.

FILED JULY 11, 1930. No. 27279.

1. **Evidence:** FRAUDULENT CONVEYANCES: INTENT. "Evidence that the party or parties charged with making a fraudulent disposition of property were engaged at or about the same time in other similar fraudulent transactions is admissible to show

fraudulent intent in making the transfer in controversy." 27 C. J. 807.

2. ———: ———: FAILURE TO TESTIFY. "Where the circumstances under which a transfer of property by a debtor is made are suspicious, the failure of the parties to testify or produce available, explanatory, or rebutting evidence is a badge of fraud." 27 C. J. 494.

3. **Fraudulent Conveyances:** SUFFICIENCY OF EVIDENCE. Record examined and found to reflect convincing proof that each and all of the challenged conveyances were made without consideration, and with the common intent and purpose on the part of the respective grantors and grantees connected therewith of hindering, delaying and defrauding the creditors of the appellant Henry D. Hamaker, and especially Lewis W. Shepard, appellee herein.

APPEAL from the district court for Cherry county: EARL L. MEYER, JUDGE. *Affirmed.*

James C. Quigley and *Herman Aye,* for appellants.

John A. McKenzie and *W. C. Heelan, contra.*

Heard before ROSE, GOOD, THOMPSON and EBERLY, JJ.

THOMPSON, J.

In this action Lewis W. Shepard, appellee, a judgment creditor of the appellant Henry D. Hamaker, sought to have set aside certain deeds and mortgages of lands in Cherry county, and to have such lands subjected to the payment of his judgment. In addition to the above named Hamaker, Juanita G. Hamaker, his wife, and Stansbury L. McFarland were made parties defendant. Decree was rendered in Shepard's favor as to certain of the lands, to wit, the south half of section 23, township 30, range 26, in Cherry county, and denied to him as to the residue. Said Hamakers jointly interposed a motion for a new trial, which was overruled. To reverse that part of the judgment favorable to Shepard, the Hamakers jointly appeal.

It may be observed that the above named McFarland filed only a general denial for an answer, and prayed that he might go hence and recover his costs. Thereafter, and before the trial was had, he died, leaving as his sole and

only heir a son, the defendant and apparent appellant Fred McFarland, in whose name the action was revived, and thereafter he, the son, interposed an answer, omitting formal parts, as follows: "Specifically denies each and all of the allegations set out and plead in said petition." It will be seen that such answer is without a prayer for relief of any kind, and is virtually a denial of ever having had or held even a claimed interest in the lands here involved, notwithstanding the fact that the petition alleged that the record title appeared in the name of the father. Further, Fred McFarland did not testify at the trial, nor did he file a motion for a new trial, but he joined in the appeal bond, notice of appeal, and was designated in the præcipe in this court as an appellant. However, he has not filed a brief. Our rule 3 provides: "Whenever the brief of the party having the affirmative is not on file by brief day, the judgment will be affirmed or the proceedings dismissed, unless otherwise ordered on sufficient showing." No showing having been made, the judgment of the trial court as to appellant McFarland should be, and is, affirmed.

As to the Hamakers: Henry D. Hamaker will hereinafter be designated as "husband," and Juanita G. as "wife." Of the claimed errors which they rely on for reversal, it is presented that the judgment is not supported by the evidence, and is contrary to the weight thereof. In support of this contention we are asked to consider the holding in *Citizens State Bank of Wood River v. Porter*, 4 Neb. (Unof.) 73, wherein, in the third paragraph of the syllabus, the commissioners stated:

"Where land has been by a man and wife conveyed to a third party for a full expressed consideration, and by that third party to the wife for a slightly greater expressed consideration by a deed of a few days' later date, and it is alleged that both deeds were without consideration, but the allegation is denied, it cannot be presumed, in the absence of all proof on the subject, that the deeds were without consideration and made merely to put the title in the wife's name."

Even if we concede the law to be as above announced, it

is not applicable to the facts reflected by the record before us. Here the record does not show an "absence of all proof" as we must assume did the record in the above cited action. This record shows that the husband, at or about the same time as the transfers involved herein were made, and subsequent to the incurring of the indebtedness to Shepard and while suit thereon was pending in Douglas county, Nebraska, had conveyed certain of his other lands to his wife with intent to hinder, delay and defraud his creditors, and especially Shepard. Further, that after judgment was entered in Douglas county in favor of Shepard, he prosecuted a creditor's bill in the district court for Cherry county, as herein, to have such conveyances set aside as fraudulent and void, and the lands subjected to the payment of his judgment. That, after the issues were duly joined and trial had, decree was entered in favor of Shepard, as prayed, against both the husband and wife, and such decree is in full force and effect. In such a situation the rule is that evidence of fraudulent conveyances, made at or about the same time as the ones challenged, is admissible to prove the grantor's fraudulent intent in making such challenged transfers, thus tending to show a common purpose and thereby linking the respective fraudulent transfers by a common design. *Sutton v. Kelliher,* 115 Ia. 632; 27 C. J. 807; 12 R. C. L. 669, sec. 175. In order to bind the grantee, however, there must be evidence showing a participation in such common design on his part as well. Such evidence is herein apparent.

In support of our previous statement of what this record reflects, attention is directed to the pleadings. Both the husband and wife in their respective answers admit the rendition and entry of the original judgment in Douglas county, which forms the basis of this action. Further, the wife in her answer admits the third and fourth paragraphs of Shepard's petition. In these paragraphs it is alleged:

"3. Plaintiff further alleges that after the indebtedness to the plaintiff had been incurred and while suit thereon was pending in Douglas county, Nebraska, the said Henry D. Hamaker caused certain deeds to be filed conveying cer-

tain property of his in Cherry county to his wife, Juanita G. Hamaker; that said conveyances were executed without consideration and for the purpose of defrauding the creditors of Henry D. Hamaker and particularly the plaintiff herein.

"4. That, thereafter, plaintiff instituted an action in the district court of Cherry county, Nebraska, to set aside said fraudulent conveyances and subject the land therein described to the payment of the plaintiff's judgment; that said action appears in the records of the district court for Cherry county, Nebraska, in Doc. ——, Page ——, or Case No. 3945; that, thereafter, said cause came on for trial and on the 26th day of May, 1924, the district court in and for Cherry county, Nebraska, entered up its judgment and decree finding that certain transfers as described in plaintiff's petition as made by the defendant Henry D. Hamaker to his wife, the defendant Juanita G. Hamaker, were without consideration and made by the defendant Henry D. Hamaker to defraud the plaintiff; that said transfers were in said judgment and decree set aside and said property subjected to the lien of the plaintiff's judgment."

The husband admits the fourth paragraph of the petition, and in addition alleges that more has been paid on the judgment than that shown by the petition.

Both the husband and wife urge an accounting, and a determination by the court on final hearing of the balance of such judgment remaining unpaid. This of itself is an admission of the existence of the basis of this action, to wit, the original judgment, and calls for the introduction of any and all of the records which tend to prove the actual credits applicable on the judgment, as well as such of the proceedings in the case as would tend to enlighten the court in reference thereto. With this in view, many of the files were introduced at the trial, and rightly so. Though the record is replete with suspicious circumstances, no evidence was offered by either of the Hamakers. This brings the matters under consideration within the rule stated in 27 C. J. 494, as follows:

"Where the circumstances under which a transfer of

property by a debtor is made are suspicious, the failure of the parties to testify or produce available, explanatory, or rebutting evidence is a badge of fraud. The presumption is that if they could have truthfully testified to facts showing the *bona fides* of the conveyance that they would have done so. It is wholly immaterial that their failure or refusal to do so is based on the advice of counsel."

The only reasonable conclusion which can be reached from an examination of this record is that it discloses convincing proof that each and all of the conveyances challenged were made without consideration, and with the common intent and purpose on the part of the parties connected therewith of hindering, delaying and defrauding the creditors of appellant Henry D. Hamaker, and especially Lewis W. Shepard, appellee herein.

Other claimed errors assigned have each been examined and found to be without merit. The judgment of the trial court is, in all things,

AFFIRMED.

OTTO R. NEWBERG, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE: FIRST TRUST COMPANY OF LINCOLN, APPELLANT.

FILED JULY 11, 1930. No. 27238.

Evidence examined and *held* to support and justify decree entered by the district court.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Burkett, Wilson, Brown & Van Kirk, for appellant.

Jesse L. Root, Sanden, Anderson, Laughlin & Gradwohl and *Maxwell V. Beghtol, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY and DAY, JJ., and JAMES and WRIGHT, District Judges.

EBERLY, J.

This is an action in equity arising out of the following

transaction: At the time of his death, Dr. Bartlett L. Paine was the owner of lot 3, block 104, Lincoln, Nebraska. In his lifetime he granted the Chicago, Burlington & Quincy Railroad Company the right to extend a switch track, known as "Tyler Stub," over and across this lot. The railroad company thereupon constructed this extension and occupied a portion of this lot with their tracks. It appears that no public record was made of this transaction by Dr. Paine. When Dr. Paine died, he left a will, by the terms of which the defendant, the First Trust Company of Lincoln, was named as executor, authorized to sell all property of which the deceased died seised, and empowered and authorized as such executor to make all necessary deeds and conveyances transferring such property without license of any court. Mr. Newberg, the plaintiff, orally bargained for the purchase of this lot with this executor, and pursuant to the bargain an executor's deed was executed and delivered to the grantee. That the grantee accepted this conveyance relying upon the representations of the executor cannot be gainsaid. The following is, in substance, a resume of practically undisputed testimony on this subject: Mr. Newberg testified with reference to the negotiations for the purchase of the lot: "I asked Mr. Easterday (the authorized representative of the First Trust Company) what the size was of the lot, and he said it is 50 by 142. And I said, 'Are you sure?' And he said, 'Well, we will verify that by getting the abstract.' Mr. Easterday called in one of the assistants, or one of the stenographers, and she went to the files and brought out the abstract and we both examined the plat which was on the abstract. Mr. Easterday says: 'It is 50 by 142.' And I said, 'Mr. Easterday, if that is the case, we will buy the lot for $5,000.'" I took the lot in reliance "on his statement that the lot was clear, 50 by 142, and no buildings on it or tracks." Thereafter the sum of $5,000 was paid by Newberg to the executor in reliance on the oral representations thus made. The executor on its part executed and delivered to the purchaser a deed of conveyance of this lot bearing date 15th day of May, 1923, which was in July,

1923, delivered to and accepted by the plaintiff at the time the second and final payment was made. On April 28, 1927, it was first discovered by Newberg that a portion of the lot was occupied by the railroad tracks. Thereupon, after proper demand, this action was commenced in the district court for Lancaster county against the railroad company and "the First Trust Company of Lincoln, Nebraska, a corporation, and as executor of the estate of Bartlett L. Paine," in which plaintiff tendered a reconveyance of the property and asked for relief in equity; first, that the railroad company be required to remove the incumbrance, that is, the tracks; second, in the alternative, that, if the above relief be denied, the plaintiff be granted rescission, and the purchase price, together with taxes paid by plaintiff, refunded and returned; or, third, for the value of the property taken by the railroad tracks and damages sustained.

After trial the district court found as to the railroad company that its occupancy of a portion of the lot, initiated under the terms of Dr. Paine's letter, before the commencement of this case and before any claim was made upon said company, had developed into "an irrevocable license" to remain and the court thereupon dismissed the action against it. It may be said in passing that, in the present condition of the record, we are inclined to the view that this determination as to the railroad company's rights is not subject to serious challenge. But as between the plaintiff Newberg and the First Trust Company, as executor of the Paine estate, the trial court determined: "The deed to the property in question from Otto R. Newberg to the First Trust Company of Lincoln, Nebraska, as executor of the estate of Bartlett L. Paine, deceased, and now in the files of this court or in the hands of the clerk thereof, be turned over to the defendant the First Trust Company of Lincoln, Nebraska, as executor upon its demand for the same; that in case defendant the First Trust Company of Lincoln, Nebraska, executor, fails to take said deed and to pay to the clerk of this court for the said Otto R. Newberg the sum of $5,000 with interest

at the rate of 7 per cent. per annum from the 15th day of May, 1923, thereon, * * * and the further sum of $429.46 with interest thereon at the rate of 7 per cent. per annum from this date within a period of twenty days from the entry of this decree, the said plaintiff shall have judgment against said First Trust Company of Lincoln, Nebraska, as executor of the estate of Bartlett L. Paine, deceased, for the sum of $1,500 with interest at the rate of 7 per cent. per annum from the said 15th day of May, 1923, together with execution for the satisfaction of the same," etc. From this determination the First Trust Company, as executor, has prosecuted an appeal.

It is the contention of the First Trust Company that the statute of limitations affords a complete defense to this action; that the executor was without authority to warrant the title, and any representations made at the time of the sale of the premises could in no manner bind the estate of Bartlett L. Paine; and that the plaintiff was entitled to neither rescission nor damages.

Taking up these questions in inverse order, it may be said the following facts seem, by fair implication at least, to be admitted by the parties. Lot 3 in suit, without the presence of the incumbrance constituted by the railroad tracks, and in the condition represented by the trust company, that is, being free of improvements or tracks, was fairly worth $5,000. Relying on the representations made by the executor as to the unincumbered character of the lot, Newberg purchased the same and paid $5,000 therefor, which representations of the trust company as to the condition of the lot were in fact untrue. The railroad tracks were at that time on a portion of this lot, and, due to the railroad company's rights in and possession of the premises, their occupancy had then ripened into "an irrevocable license" to remain. The presence of this incumbrance constituted an actual damage to the value of the lot in the sum of $1,500, or, in other words, the actual lot sold, because of the presence of the trackage upon it, was worth not more than $3,500. It would have been

worth $5,000 had the representations believed and relied upon been true.

If it be conceded that Dr. Paine's estate is not liable on the covenants of the deed, nor because of the representations of the executor, which plaintiff relied upon at the time of the purchase, it must be admitted that to the extent of $1,500 there has been a partial failure of consideration in the transaction here presented, and to this extent the Paine estate has been augmented as a result of what is claimed in its behalf, solely because of lack of *scienter,* amounts to no more than a mistake on the part of the executor.

This court was early committed to the doctrine: "Whether in an action for damages for false representations it is necessary either to aver or prove the *scienter,* the authorities do not agree. The better rule, and the one adopted by this court, is that the intent or good faith of the person making false statements is not in issue in such a case." *Johnson v. Gulick,* 46 Neb. 817. "A purchaser of real estate has a right to believe and rely upon representations made to him by his vendor as to the character, quality, and location of the property, when the facts concerning which the representations are made are unknown to the vendee." *Hoock v. Bowman,* 42 Neb. 80. See *Farley v. Weiss,* 76 Neb. 402. "Where one has made representations of fact shown to be false upon which the other party has relied to his damage, the intent or good faith of the party making the representations is immaterial in an action by the injured party to recoup his damages, or in an action by the former where the latter pleads the fraud of the plaintiff as a defense." *Bauer v. Taylor,* 4 Neb. (Unof.) 710. Indeed, the general rule appears to be: "False representations made by a vendor as to his title, though innocently made, upon which his vendee relies to his injury, may constitute such constructive fraud as will entitle the purchaser to a rescission." 5 Thompson, Real Property, 427, 428, sec. 4313. See *Baker v. Maxwell,* 99 Ala. 558; *Groppengiesser v. Lake,* 103 Cal. 37; *Morris v. Courtney,* 120 Cal. 63; *Woodruff v. Garner,* 27 Ind. 4; *West v. Wright,*

98 Ind. 335; *Bullitt v. Farrar,* 42 Minn. 8; *Vaughn v. Smith,* 34 Or. 54. And this court is also committed to the principle: "The plaintiff is entitled to relief if the representations were a material inducement to the contract, although he may have made efforts to discover the truth thereof, and did not rely wholly upon the veracity of defendant." *Foley v. Holtry,* 43 Neb. 133. See, also, *Brucker v. Kairn,* 89 Neb. 274; *Abts Co. v. Cunningham,* 95 Neb. 836; *McCandless v. Greusel,* 103 Neb. 472. It would seem that the evidence in this case considered *de novo* fairly sustains the conclusion that defendant executor was guilty of legal fraud, and under the facts in this case there can be no question but the railroad right of way, together with its tracks thereon extending over and across this lot, in the light of the use made of it, constituted an "incumbrance" both in the technical sense of the term as well as when employed in ordinary usage. 4 Thompson, Real Property, 620, sec. 3510. It seems the measure of damages applicable to the situation before us is: "If the incumbrance is practically inextinguishable, as in case of a permanent easement, the measure of damages is the difference in the value of the land without and with the incumbrance." 4 Thompson, Real Property, 686, sec. 3587, and cases cited therein.

On the basis that what has occurred amounts to no more than a "mistake," it must be conceded that as a necessary result the estate of Bartlett L. Paine has been enhanced in the sum of $1,500. "If a party in ignorance or mistake of his rights and interests execute a conveyance, although no fraud is practiced upon him, a court of equity will relieve against the instrument; for it is against good conscience to take advantage of one's ignorance to obtain his property. Thus, if an heir, in ignorance of the value of his inheritance, or in ignorance that some legacies or devises had lapsed, should convey his interest for an inadequate consideration, equity would convert the purchaser into a trustee. And if the purchaser should have full knowledge, or should stand in any confidential relation, or should practice the slightest art to mislead or conceal, the

equities would of course be much stronger against the transaction; but these circumstances are not necessary to avoid the conveyance, for relief will be granted where both parties are in a mutual state of ignorance, or are laboring under the same mistake." 1 Perry, Trusts and Trustees (7th ed.) 311, sec. 184.

It would seem under the authorities just referred to, which appear to be applicable to the facts in the instant case, that the fraud established constitutes even a stronger equity against the transaction as a basis of rescission. However, it is also to be remembered that upon the discovery of the mistake the plaintiff in the instant case tendered a reconveyance of all that he received in the transaction, and demanded relief in the alternative from the executor and the Paine estate represented by it. Therefore, assuming for the purpose of this discussion, but not deciding, that the term "mistake" is properly applicable to the transaction before us, it having resulted in the augmentation of the estate of Bartlett L. Paine in the sum of $1,500, to this extent the trust of the executors has been unjustly enriched and the proper application of the principles above quoted would result in a recovery by the plaintiff herein irrespective as to whether the false statements relied on amount to "legal fraud" or are properly designated by the term "mistake."

A somewhat similar question was presented to the supreme court of Iowa in the case of *Deery v. Hamilton,* 41 Ia. 16. In that case an executor borrowed money under such circumstances that rendered the entire transaction invalid as to his trust, but the estate received the money and actually benefited thereby. It was accordingly held: "The estate has received the benefit of the money which was advanced by the defendant. It ought in good conscience to repay it with legal interest. This is not required because of the contract under which the money was borrowed, which is invalid, but on the ground that the estate has had the benefit of the money received from defendant." Under the circumstances detailed in the evidence in the case before us it would seem that it is against "good con-

science" to take advantage of one's ignorance to obtain his money. Even if we accord full faith and credit to the contentions of the defendant as to its honesty of purpose, still it was the clear understanding of all parties that plaintiff should receive and become the legal owner of lot 3 as an entirety. This was the true consideration for which he had paid his money, but contrary to honest belief of all to the extent of a portion of the lot occupied by the railroad company and of the value of $1,500 this proved to be a legal nullity. As to this portion of the consideration plaintiff acquired practically nothing. He paid this $1,500 as part of the $5,000 and for it received nothing in return. Upon the plainest principles of right, therefore, the consideration to the extent of $1,500 should be restored to him. Nor would this operate unjustly upon the defendant executor or the Paine estate represented by it. As to the portion of the lot covered by this $1,500 incumbrance it was supposed that the Bartlett L. Paine estate had something of value to sell, and which on its behalf the defendant executor undertook to transfer to the plaintiff, but it turned out that this portion of the lot, due to the presence thereon of the tracks in question, had no existence in fact from the standpoint of value. Having by misapprehension procured something for its trust estate without parting with anything, why should not restoration be made? Indeed, it would appear to the extent of the $1,500 incumbrance nothing was conveyed on behalf of the estate, nothing was lost by it, but to that extent the estate was certainly unjustly enriched by receipt of the actual money of plaintiff in a manner which, without reference to the obligations of contract or fraud, "good conscience" demands be restored to the party unjustly deprived thereof. It must be conceded also that as a matter of fact the plaintiff in the instant case entered into a transaction disclosed by this record in reliance upon the representations of the executor acting under our statute in the capacity of a trustee. This executor, or trustee, is now seeking to retain for its estate property which the estate received because of the false representations made by its representa-

tive. The general rule is: "A principal who retains benefits derived from the fraudulent conduct of his agent is chargeable with the instrumentalities employed by the latter in carrying out the fraudulent purpose." *Dresher v. Becker,* 88 Neb. 619; *Tylee v. Illinois C. R. Co.,* 97 Neb. 646; *Nye-Schneider-Fowler Grain Co. v. Hopkins,* 99 Neb. 244.

But, by the clear weight of authority, the application of the principle is not limited to the relation of principal and agent. The language usually employed implies a more extended field. Thus it is said: "One who seeks to take advantage of a contract made for his benefit by another must take it subject to all legal defenses and inherent equities arising out of the contract, such as the fraud of the party procuring it, the nonperformance of conditions, or the right to a set-off, unless the element of estoppel has entered." 13 C. J. 699, sec. 799. See 4 Page, Law of Contracts (2d ed.) 4217, sec. 2393; *Assets Realization Co. v. Cardon,* 272 Pac. (Utah) 204; *Farmers State Bank v. Nicholson,* 36 Wyo. 221; *Fish v. First Nat. Bank,* 150 Fed. 524; *Farris v. Pitts,* 221 Mo. App. 1204. Indeed, this court has said: "It is equally as fraudulent to attempt to enforce a writing executed by mutual mistake in such manner as not to express the real agreement between the parties as it is to procure such a writing by deceit or circumvention." *Story v. Gammell,* 68 Neb. 709. Whether money or property lost or damages suffered because of false representations by the trustee, or by the executor, is under all circumstances within the rule quoted, *quære,* however, we do not find it necessary to determine in this case. The "false representations" or "mutual mistake" in the instant case relate to the property owned by and conveyed on behalf of the estate of Dr. Paine in a transaction of which the "false representations" or "mutual mistake" constituted an integral part, resulting in a deficiency in the property attempted to be conveyed. The $1,500 loss or damage resulting therefrom to the plaintiff has accrued to the defendants in the form of unintended profits and constitutes an unjust augmentation of the estate thus rep-

resented by the executor. The gravamen of the instant action is not a claim for damages sustained by the plaintiff because of a breach of a continuing contract whether executory or executed. It is based upon the equitable right of rescission. True, the decree of the district court in this case, in terms granting alternative relief, purports to award damages.

It must be conceded, however, that the rule is: "A misrepresentation as to quantity or acreage may constitute a fraud on the part of the vendor for which the purchaser may rescind." 27 R. C. L. 645, sec. 407. Still, it is well established by precedent that the inherent discretion of a court of equity, in an action for rescission, instead of decreeing an unconditional rescission to the extent of fully restoring the parties to their former status and condition with a view of rendering its relief complete and more appropriate to the peculiar case before it, "Instead of granting relief by way of rescission, * * * may and frequently does grant the purchaser an abatement from the purchase price in case of a deficiency in quantity." And, indeed, "The purchaser has been restricted to this form of relief and a rescission of the transaction denied even where the vendor was guilty of fraudulent representations as to quantity." 27 R. C. L. 645, sec. 407. The provisions therefore which appear in the decree entered in the district court in the present case for damages must be deemed as an "abatement from the purchase price" as an incident of rescission and not identical with damages to which a party is entitled in an action at law for the breach of a valid contract. In other words, the liability of the defendant in the instant case is based, not upon what the plaintiff lost by reason of the fraud or the mutual mistake, but rather as limited to what the defendant estate possesses and which was obtained because of the acts and representations of its executor. The present action does not sound in tort, nor does it necessarily involve the limitations imposed by the principles of common law proceedings upon the proper use of common counts such, for instance, as "for money had and received." While on the question of

practice the authorities are not harmonious, still on the question of equitable right of recovery as applied to the facts in the instant case there seems to be no serious conflict. *Goodspeed v. Fuller,* 46 Me. 141; *Way v. Cutting,* 17 N. H. 450; *Murdock v. Gilchrist,* 52 N. Y. 242; *Wright v. Dickinson,* 67 Mich. 590. It follows in view of our liberal Code provisions the decree of the district court, though possibly more favorable to the defendant than they of right might demand, is in conformity with the principles of equity, supported by the evidence, and constitutes a proper disposition of the case.

The defendant further contends that the executor in this case was not guilty of legal fraud, and that, being liable, if at all, on the basis of an honest mistake made, section 8517, Comp. St. 1922, is controlling, and an action based on mutual mistake is not continued four years after the discovery of the mistake. This court has apparently, in express terms, announced a contrary conclusion. *Shanahan v. Fidelity-Phenix Ins. Co.,* 117 Neb. 132; *Carter v. Leonard,* 65 Neb. 670; *Pinkham v. Pinkham,* 60 Neb. 600; *Ainsfield v. More,* 30 Neb. 385. Appellant favors this court with a learned discussion of these cases, the conclusion of which is that the point here involved has never been the controlling point in any of the judgments rendered by this court and the statements announced in each of the decisions enumerated amount to no more than *obiter dictum,* and the rule apparently announced therein by this court is in contravention of the express terms of the statute. Conceding, *arguendo,* appellant's premise that to render a statement of law authority as a precedent it must be involved in and presented by the facts of the case then for consideration and be made a "controlling point of any judgment rendered" therein, manifestly the cases cited are not for reexamination in the present opinion. True, in appellant's brief we find this statement: "This action was not commenced until November 12, 1927." It must be admitted that under appellant's contention this fact is essential to present the question of the application of the statute of limitations in the instant case. There is, how-

ever, no reference made in the briefs, as required by the rules of this court, to a place in the transcript or bill of exceptions where this statement can be substantiated and a careful search of both fails to supply this information. Section 8523, Comp. St. 1922, provides: "An action shall be deemed commenced, within the meaning of this chapter (limitations), as to the defendant, at the date of the summons which is served upon him." Assuming this fact was one of which judicial notice could properly be taken by the trial court, in view of the records in its presence, that tribunal found against the appellant here. This tribunal is limited to the transcript and bill of exceptions filed herein, and stipulations of counsel are not even permitted to supply the omissions thereof. The necessary conclusion is that, as now advised, no consideration can properly be given to the point urged.

It follows, therefore, that the decree entered by the trial court is correct and its judgment is

AFFIRMED.

VERNON L. ARMSTRONG, APPELLANT, V. HELEN C. MARR, APPELLEE.

FILED JULY 11, 1930. No. 27290.

Set-off. "In the absence of equitable considerations, a defendant can only plead as a set-off a claim or judgment upon which, at the commencement of the action, he might have maintained an independent suit against the plaintiff." *Spencer v. Johnston*, 58 Neb. 44.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Reversed.*

Daniel J. Gross, for appellant.

Rose, Wells, Martin & Lane, contra.

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

EBERLY, J.

This is the second appearance of this case in this court. It appears that, quoting from appellee's brief: "On March 7, 1927, Vernon L. Armstrong instituted his action against Mrs. Marr for $500 damages on account of breach of a cleaning contract; on October 18, 1927, judgment was entered for plaintiff in the amount of $524.93; defendant appealed to this court, which affirmed the judgment, the mandate being filed in the office of the clerk of the Douglas county district court on April 17, 1929. On or about April 23, 1929, appellee bought and paid for, and on April 29, 1929, she filed in the office of the clerk of the district court assignments of three judgments against the plaintiff," and in favor of her assignors, transcripts of which were filed in said court, and "on which there was then due $553.39; the balance due on plaintiff's judgment, $70.43, was paid into court on April 29, 1929. The next day, Mr. Gross," the attorney who had represented plaintiff in this successful litigation, "filed his notice of attorney's lien." After trial or hearing the district "court on July 17, 1929, sustained appellee's right of set-off and ordered the clerk of the court to 'satisfy in full on his records the three above mentioned judgments owned by the defendant.' The sole question in the case is as to the right of set-off."

We do not overlook the contention of Mr. Gross, who appears in this case as intervener, based on the claim that by means of requests for delay which were unconscionable, if not fraudulent, in character he was induced to refrain from filing his attorney's lien until after the judgments in suit had been purchased by defendant and thereby was unjustly deprived of his rights. We expressly disclaim in any manner passing upon or determining the issues presented by him in this case, thus leaving the same for the future consideration of the district court, as a court of equity, wholly unaffected by this opinion.

We accept for the purpose of this opinion only, but do not decide, defendant's contention that the sole question in the case is as to the right of set-off. The claim of this right on the part of Helen C. Marr is made by a pleading

entitled and designated "Motion for Set-Off" which was filed in the case of Vernon L. Armstrong v. Helen C. Marr after the mandate of this court had been received, filed and entered of record in the district court for Douglas county. No facts are alleged therein, save and except the ownership of the three judgments by assignment, that they are unpaid, that the balance due, after deducting the amount of such judgments from the original judgment entered in the case and affirmed by this court, had been paid by her, and closes with the prayer that the three judgments be set off against the judgment theretofore obtained by Vernon L. Armstrong in the above entitled case. There is an entire failure to allege any facts which would in any manner justify the exercise of, or invoke the equitable powers of, the court. Limited to the record before us, we are compelled to find that the judgments referred to, under the facts disclosed in this record, are not the proper subject of set-off in this case.

In the early case of *Simpson v. Jennings*, 15 Neb. 671, it appears: "The main question presented by the record in this case is the alleged error of the court below in refusing to allow the set-off presented by the defendants therein in their amended answer. This set-off consists of a judgment recovered against George Jennings and Anna Maria Jennings, in her lifetime, by one John Dill, and which said judgment came to the hands of the plaintiffs in error, other than the said Richard D. Simpson, by assignment of the said John Dill, since the commencement of said action in the court below." The gist of the opinion appears in the syllabus of that case as follows: "A claim on the part of a defendant, which he will be entitled to set off against the claim of a plaintiff against him, must be one upon which he could, at the date of the commencement of the suit, have maintained an action on his part against the plaintiff." A similar question was before this court in *Burge v. Gandy*, 41 Neb. 149, in which case, however, the judgment was owned by defendant at the time of the commencement of the action against the defendant. *Simpson v. Jennings, supra,* was referred to

and followed and the reasoning of the court appears from the following excerpt from the opinion of Commissioner Ragan: "Section 104 of the Code of Civil Procedure provides: 'A set-off can only be pleaded in an action founded on contract and must be a cause of action arising upon contract or ascertained by the decision of the court.' Mrs. Burge's action is founded on contract, and the set-off as pleaded by Mrs. Gandy not only arose upon contract, but had been ascertained by the judgment of a court. In *Simpson v. Jennings,* 15 Neb. 671, it is said: 'A claim on the part of a defendant, which he will be entitled to set off against the claim of a plaintiff against him, must be one upon which he could, at the date of the commencement of the suit, have maintained an action on his part against the plaintiff.' Mrs. Gandy, at the time this suit was commenced, could have maintained an action against Mrs. Burge on the judgment which she pleaded as a set-off. The set-off then pleaded by Mrs. Gandy came within both the letter and the spirit of the Code and within the construction placed thereon by this court." In the case of *Spencer v. Johnston,* 58 Neb. 44, it was again sought to make a judgment the subject of set-off in a law action and this right was expressly denied, Justice Sullivan writing the opinion. The point of the case appears in the following syllabus: "In the absence of equitable considerations, a defendant can only plead as a set-off a claim or judgment upon which, at the commencement of the action, he might have maintained an independent suit against the plaintiff." The following cases also illustrate the proper application of the rule: *Tessier v. Englehart & Co.,* 18 Neb. 167; *Wilbur v. Jeep,* 37 Neb. 604; *Richardson v. Doty,* 44 Neb. 73; *Shabata v. Johnston,* 53 Neb. 12; *Gurske v. Kelpin,* 61 Neb. 517; *Stone v. Snell,* 86 Neb. 581. In the case of *Citizens State Bank v. Worden,* 95 Neb. 53, this court reannounced the doctrine in the exact terms of *Simpson v. Jennings, supra.* It is also to be noted that, due to the peculiar circumstances of that case, a previous demand being necessary and there being a failure to affirmatively plead demand by the party claiming a set-off,

it was held that, a proper demand before this suit was commenced, which is part of the set-off, not being pleaded, therefore plaintiff was not entitled to the same. In discussing this point Justice Rose says: "In pleading a set-off in an action on a note, defendant should conform to the rules by which the sufficiency of plaintiff's petition would be tested, if assailed by demurrer. *Peck v. Trumbull,* 12 Neb. 133; *Dale v. Hunneman,* 12 Neb. 221; Bliss, Code Pleading (3d ed.) sec. 367. The set-off pleaded does not conform to the principle stated. It is not shown that defendant, when this suit was commenced, could have maintained against plaintiff an action for deposits." The principle of pleading thus announced is applicable to our instant case.

The authorities on which appellee relies, in view of the issues presented and determined herein, do not appear in point. *Clark v. Sullivan,* 3 N. Dak. 280, relied upon by appellee, is controlled by the North Dakota statute, which provides: "'Mutual final judgments may be set off *pro tanto,* the one against the other, by the court, upon proper application and notice.' Section 5109, Comp. Laws." But no similar statutory provision exists in Nebraska, so far as advised, neither are the judgments under consideration "mutual." Appellee also cites *Clark Implement Co. v. Wallace,* 103 Neb. 26. However, this case was a proceeding in equity in which it was alleged as one of the grounds for the interposition of the equity court that the defendant was insolvent, a fact which the appellee in the instant case could not rely upon because not pleaded. In *Tootle-Weakley Millinery Co. v. Billingsley,* 74 Neb. 531, relied upon by appellee, we have another application of the equitable doctrine. Our court there held: "A party against whom a judgment has been rendered in favor of the trustee of a bankrupt may, *by proper proceedings in equity,* be allowed to offset against the same a claim allowed in its favor against the bankrupt in the bankruptcy proceedings." (Italics ours.) It will be noted that the relief afforded was, "by proper proceedings in equity," an element wholly absent in the controversy before us. The same

conclusion is applicable to *Rogers v. Buettgenback,* 114 Neb. 834. Justice Day in delivering the opinion of the court, in the discussion of the subject of set-off, says in part: "It being shown that defendant Buettgenback was insolvent, we see no valid reason why a court of equity may not set off his note against the judgment, or at least restrain the collection of the judgment for a reasonable time to permit the holder of the note to reduce it to judgment and then set off one judgment against the other. In *Richardson v. Doty,* 44 Neb. 73, it was held: 'The provisions of the Code of Civil Procedure in regard to set-off are not exclusive. The insolvency of a party against whom the set-off is claimed is a sufficient ground for a court of chancery to allow it in cases not provided for by statute.' In *State v. Farmers State Bank,* 113 Neb. 497, it was held: 'Where peculiar equities intervene between the parties, a court of equity may enjoin the collection of a judgment until the debtor litigates an unliquidated claim against his creditor, and if the debtor succeeds the court may set off the judgments so far as one may equal the other.' The same principle was announced in *Wells v. Cochran,* 88 Neb. 367, and *Clark Implement Co. v. Wallace,* 103 Neb. 26." And it may also be noted that the rule upon which appellee relies is but a restatement of the rule as limited to proceedings in equity which was early announced by this court in the case of *Thrall v. Omaha Hotel Co.,* 5 Neb. 295: "The insolvency of a party against whom a set-off is claimed, is a sufficient ground for a court of chancery to decree such set-off in cases not provided for by statute." The conclusion therefore follows that under the terms of our statute the plaintiff in this case was not entitled to a set-off.

True, certain equitable considerations may exist which, if properly pleaded in an equitable proceeding, would entitle him to this right; but, there being no proper pleadings setting forth facts upon which "equitable considerations" might be supported, this question is not before us.

But we do not desire to be understood as here determining that under the facts in this case the amendment of

pleadings to properly allege the insolvency of the plaintiff, followed by appropriate proof establishing this fact, will necessarily entitle the defendant to set off these judgments in controversy. While it is doubtless true that "the insolvency of the party against whom the set-off is claimed is, as a broad general rule, held to be such a special equity as will induce a court of equity to take jurisdiction to allow the set-off. * * * There are some very well-considered cases which hold that mere insolvency alone does not constitute a ground for the interference of the court, and that some further equity must exist in order to induce an equity court to act." 34 Cyc. 638-640. This court has, in view of the facts in each case then under consideration, repeatedly announced the "broad general rule" in cases determined by it. In so doing it has not, in so far as the writer is at present advised, negatived the possibility of an exception thereto or determined that exceptional facts involved in a given case might not necessitate the application of the modification suggested by the text quoted. So, also, the evidence in the record and the arguments of counsel at the bar fairly support the inference that some, possibly all three, of the judgments in controversy were rendered more than five years prior to the purchase thereof by the defendant. The proceeding which under the facts in this case would seem proper to secure the set-off of the judgments in controversy against plaintiff's demand is in the nature of an equitable action. This court, it seems, is committed to the doctrine: "A domestic judgment is a specialty within the meaning of section 10 of the Code (Rev. St. 1913, sec. 7567), and an action thereon is barred by the statute of limitations after five years from the date of the judgment." *Armstrong v. Patterson,* 97 Neb. 871; *Fisher v. Woodard,* 103 Neb. 253.

Quære: If the evidence establishes that more than five years have elapsed since the rendition of a judgment prior to its acquisition by the defendant herein, or prior to the filing of defendant's "Motion for Set-Off," will such judgment support an equitable action for set-off? The question suggested appears to be necessarily involved in this case.

However, we do not assume to determine it. We determine only that, in view of the issues submitted to the trial court, its judgment thereon was erroneous.

It follows therefore that the judgment rendered is reversed and the cause remanded for further proceedings in harmony with this opinion.

REVERSED.

STATE, EX REL. CLAY BROWN ET AL., APPELLANTS, V. SCHOOL DISTRICT NO. 44 OF KEYA PAHA COUNTY ET AL., APPELLEES.

FILED JULY 11, 1930. No. 27447.

Schools and School Districts: CONSOLIDATED DISTRICTS: TRANSPORTATION OF PUPILS. The history of the organization of a school district by the union of other districts determines whether it is, under the statutes, a newly formed district or a consolidated district. Record examined and *held* that district No. 44 is a consolidated district as contemplated by the legislature under section 6576, Comp. St. 1922, which makes it the duty of such a district to furnish transportation of pupils to and from the school.

APPEAL from the district court for Keya Paha county: ROBERT R. DICKSON, JUDGE. *Reversed, with directions.*

J. J. Harrington, for appellants.

Ross Amspoker and *H. G. Greenamyre, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

DAY, J.

This is an application for a writ of mandamus against the directors of school district No. 44 of Keya Paha county, Nebraska, by resident taxpayers of said district to require them to furnish transportation for their children to and from school. Under section 6576, Comp. St. 1922, consolidated school districts are required to furnish such transportation. The trial court denied this writ. Since it is admitted by the parties that, if this is a consolidated school

district under the statute, it should furnish such transportation, the sole question presented is whether district No. 44 is a consolidated district. In order to determine this question it is necessary to examine the history of the organization. In July, 1916, two separate and distinct districts, known as 44 and 77 became district No. 44. The appellees contend that the districts were united under sections 6241 and 6242, Comp. St. 1922, which provide for the formation of a new district, while the appellants contend that the union took place under chapter 121, Laws 1915, which provides for a consolidated school. As stated in appellees' brief, the requirements as to consolidated schools, as to organization, are much the same as the requirements in the formation of a new district. Does the proceeding followed in the organization of district No. 44 characterize it as a new district or as a consolidated school? Under the statute, new districts may be formed from other organized districts. "The county superintendent shall have discretionary power to create a new district from other organized districts upon a petition signed by one-third of the legal voters in the district affected." Comp. St. 1922, sec. 6241. This procedure was not followed, but instead each district voted to consolidate as provided under chapter 121, Laws 1915. Section 2 of said chapter 121 provides that districts located contiguous to each other may unite and form one consolidated district. The appellees contend that this section is limited to districts providing high school instruction. This section did not so limit the consolidation of schools. It is not ambiguous and needs neither explanation nor construction. The record sustains the conclusion that the two districts in the organization of district No. 44 substantially followed this method rather than the other. A district will be presumed to have been legally organized when it shall have exercised the franchises and privileges of a district for a term of one year. This district was organized in 1916 and has been functioning as such to this date. *Kockrow v. Whisenand,* 88 Neb. 640; *State v. School District,* 42 Neb. 499. The intention of the people of two districts must be determined

by the things they did in the organization of district No. 44, rather than by the suggestion of the appellees as to what would have been more practicable for them to have done. If the school district organized is not the type suitable for the territory included within district No. 44, there is nothing to prevent the electors of the district proceeding under the law to secure an organization suitable to their requirements. No useful purpose would be served by quoting at length these various provisions of the statutes. The appellees have not directed our attention to anything that characterizes this district as a newly formed district rather than a consolidated district.

We have examined the record and concluded that school districts No. 44 and No. 77 substantially complied with chapter 121, Laws 1915, in the organization of district No. 44, and that said district is a consolidated district as contemplated by the legislature under section 6576, Comp. St. 1922. The judgment of the lower court is reversed and the cause remanded, with directions to issue the writ of mandamus.

REVERSED.

WILLIAM W. MERCER, APPELLEE, V. WILLIAM T. FENTON, WARDEN, APPELLANT.

FILED JULY 11, 1930. No. 27529.

1. **Criminal Law**: SENTENCE. Under section 10256, Comp. St. 1922, when one is convicted of a felony while a paroled convict, which parole is revoked or revocable, the trial court should set the time for the beginning of the sentence at the completion of the first sentence.
2. ———: ———. Where a sentence for a second offense sets the commencement of imprisonment prior to the completion of a prior sentence by a different court, under which the convict is paroled at the time of the commission of the second offense, it is erroneous, and may be corrected by a proper proceeding.
3. ———: ———. Such an erroneous sentence, from which error is not prosecuted, does not nullify a prior sentence by another court for a different crime.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Reversed, with directions.*

C. A. Sorensen, Attorney General, and *George W. Ayres,* for appellant.

Allen & Requartte and *O. C. Wood, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

DAY, J.

This is a habeas corpus action brought by William W. Mercer against William T. Fenton, warden, to secure his release from the Nebraska state penitentiary. The trial court ordered his release from custody. Mercer pleaded guilty on the 6th day of October, 1924, to the crime of horse stealing in Sioux county, Nebraska, and was sentenced to serve a term in the state reformatory of from one to ten years. On the 27th day of March, 1926, he was paroled. At that time, as a condition precedent to his parole, he entered into a parole agreement by which he bound himself among other things to obey the law and live honestly. On the 14th day of April, 1926, his parole was revoked by the board of pardons for that it appeared to the board that he had stolen two ladies' watches and other jewelry from the home of his employer in Lancaster county, Nebraska, and had departed therefrom for parts unknown. Soon after the revocation of his parole, the board of pardons learned that he was being held in custody in Douglas county upon a criminal charge for an offense alleged to have been committed in that county, and the board of pardons asked for his return to the Nebraska state reformatory as a parole violator. The request for his return was refused by the authorities of Douglas county who wished to hold him for prosecution for the offense committed in that county. On the 6th day of May, 1926, he pleaded guilty to a charge of attempted robbery in the district court for Douglas county and was sentenced to serve a term of three years in the penitentiary for that crime. A dis-

charge from this sentence was issued to him on the 5th day of October, 1928. On the same day the board of control made an order transferring him from the state reformatory for men to the state penitentiary.

There is no substantial dispute in the evidence. The only question involved is whether or not plaintiff, having committed a fresh crime while on parole, sentenced a second time, taken to the penitentiary and required to immediately begin serving his second sentence, can now, after his second sentence has been completed, be compelled to serve the unexpired portion of his first sentence, that is, the Sioux county sentence. The answer to this question necessitates a construction of section 10256, Comp. St. 1922, which reads as follows:

"If any prisoner in the judgment of the board shall violate the conditions of his parole or release as fixed by the board of pardons, he shall thereafter be treated as an escaped prisoner owing services to the state and shall be liable, when arrested, to serve out the unexpired term of his maximum possible imprisonment, and the time from the date of his declared delinquency to the date of his arrest shall not be counted as any portion or part of time served; and any prisoner at large upon parole or conditional release, who shall commit a fresh crime and upon conviction thereof shall be sentenced anew to the penitentiary, shall be subject to serve the second sentence after the first sentence is served or annulled; said second sentence to commence from the termination of his liability upon the first or former sentence."

Mercer was paroled March 27, 1926. His parole was revoked April 14, 1926. It cannot be seriously disputed that at this time Mercer as a parole violator was subject to serve the remainder of his first sentence, which was approximately eight years and six months, in the state reformatory for men. This was his liability to the state of Nebraska, when, on May 6, 1926, he was, upon a plea of guilty to the offense of attempted robbery, sentenced to three years in the state penitentiary. If he had been sentenced as he contends the law required him to be, so

that this second sentence should commence when the first is completed, then his liability to the state was upwards of eleven years. This liability has now been discharged to the extent of the second sentence. The prisoner contends that, since he was not required to first serve the prior sentence, he cannot now be required to discharge to the state that liability for penal servitude. We decline to construe this section to that effect. It is clear that the legislature intended that two such sentences should run consecutively and not concurrently. It directed the manner and order in which these sentences should be served. The second sentence should have commenced when the first had been completed. Under section 10256, Comp. St. 1922, when one is convicted of a felony while a paroled convict, which parole is revoked or revocable, the trial court should set the time for the beginning of the sentence, at the completion of the first sentence. However, we have held that the time for beginning a sentence is not an essential part of the judgment. The essential element in such a judgment is the kind and amount of punishment, without reference to when it is to be inflicted. *Riggs v. Sutton,* 113 Neb. 556. It does not appear in the record that Mercer, at the time of the Douglas county sentence, took any exception to the sentence, or that he ever sought to correct or question it until he filed this application. In the recent case of *State v. Ryder,* 119 Neb. 704, we held: "When sentence is pronounced upon one already serving a sentence from another court, the second sentence does not begin to run until the sentence which the prisoner is serving has expired, unless the court pronouncing the second sentence specifically states otherwise." The second sentence as construed most favorably to the prisoner is merely erroneous. No effort was made by him to correct the error. This proceeding was brought more than a year after the completion of that sentence to release him from the first sentence. By no possible construction of section 10256 can it be held that an erroneous sentence by one court nullifies a prior sentence by another court for a different crime.

Mercer places great reliance upon *King v. Fenton*, 119 Neb. 872. This is due to a mistaken notion as to the facts in that case, which are not stated fully in the opinion. In the case at bar, the board of pardons and paroles was diligent. They promptly revoked his parole with no unnecessary delay and their records are, relative to the matter, complete and unchallenged.

An examination of the record in this case discloses no appealing equities. A paroled convict, who in the short space of forty days, violates his parole agreement by stealing jewelry from his employer and departs for parts unknown, for which his parole is revoked, commits another crime, and is again convicted of a felony, is not entitled to a discharge from the liability of punishment for said violation because the court erroneously required him to first serve the second sentence.

Other questions were argued orally before the court, but are neither discussed in the briefs nor presented by the record. The judgment of the trial court is reversed, and the cause is remanded, with directions to dismiss the application for a writ of habeas corpus.

REVERSED.

HARVEY E. LINDLEY, APPELLEE, V. WABASH RAILWAY COMPANY, APPELLANT.

FILED JULY 11, 1930. No. 27122.

1. **Appeal: REMOVAL OF CASE.** Where it appears that a state court in which an action is begun refuses to order a removal of the case to the federal court upon proper petition therefor, but notwithstanding such refusal the federal court treats the cause as removed and orders the same remanded to the original forum, no error can be predicated upon such refusal to remove.
2. **Master and Servant: INJURY TO SERVANT: PROOF.** In an action under the federal employers' liability act by a brakeman of a railway company for personal injuries occasioned by having fallen under the wheels of a train, it is incumbent upon the plaintiff to prove by a preponderance of the evidence that the instrument that caused his injury was at the time engaged in some phase of interstate commerce.

3. Commerce: INJURY TO RAILWAY EMPLOYEE: PROOF. In an action under the federal employers' liability act against a common carrier by railway by a brakeman for personal injuries, it is sufficient if it appears that the train upon which he was engaged as a brakeman was operating between states and at the time of his injuries was engaged in interstate commerce, notwithstanding such brakeman at the time of his injury was performing the immediate service of assisting in the handling of purely intrastate freight.
4. ———: ———: ———. Where a brakeman, employed by a railway company upon an interstate train which is capable of being used in the transportation of commercial commodities from one state to another, is negligently injured while assisting in the unloading of purely intrastate freight, such service is so closely connected with interstate commerce as to entitle such employee to recover under the federal employers' liability act.
5. Master and Servant: INJURY TO SERVANT: RECEPTION OF EVIDENCE: PREJUDICIAL ERROR. Where an employee brings an action against a railway company to recover damages for personal injuries, basing his right of recovery upon the fact that the defendant had permitted its depot platform to become out of repair and dangerous, the reception of evidence by the trial court, over objection of the defendant, as to subsequent repairs made and precautions taken on behalf of the defendant, after the accident complained of occurred, to prevent the recurrence of similar accidents in the future, constitutes prejudicial error.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Reversed.*

Homer Hall and *R. B. Hasselquist,* for appellant.

Gray, Brumbaugh & McNiel and *Miles Elliott, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD and DAY, JJ., and CARTER and CHASE, District Judges.

CHASE, District Judge.

This is an action brought by Harvey E. Lindley against the Wabash Railway Company to recover damages for personal injuries alleged to have resulted from the negligence of the defendant. The action was brought under the federal statute known as the employers' liability act. The case was tried to a jury, terminating in a verdict for the plaintiff,

and from the judgment upon the verdict the defendant presents the record to this court for review.

The defendant is an interstate railway company and was at the times herein mentioned engaged in the business of the common carriage of passengers and freight over its railway system.

The plaintiff, on and prior to December 13, 1926, had been and was employed by the defendant as a brakeman. Early in the morning of December 13, 1926, defendant's local freight train No. 71 left the town of Stanberry, Missouri, for its regular run to Council Bluffs, Iowa; those two points being the southern and northern terminals of its local freight division. The plaintiff on that day was acting as head brakeman on this train. As the train approached the village of Clyde, Missouri, an intermediate station on the division, it slackened its speed until at the time the engine arrived at the station platform it was traveling about ten or twelve miles an hour. The plaintiff was riding on the engine, and as the train came to the depot platform the plaintiff undertook to alight from the steps of the engine upon the platform, and in so doing fell and, in some way, was precipitated under the train, his feet or legs becoming entangled in the trucks of the tank. He was dragged approximately 100 feet before the train came to a stop. While he was thus entangled the wheels of the train passed over a portion of his body, mangling his left leg in such a manner that amputation near the hip resulted. This accident occurred early in the morning following a night of zero weather and the platform was covered with a heavy coating of white frost.

The case seems to have been tried below by the plaintiff upon the theory that the platform at this particular point where he alighted was defective, in that the sills supporting the same had become decayed to such an extent that when the weight of the plaintiff came in contact with the platform it sagged down several inches, thus making an abrupt incline toward the wheels of the train, causing him to slip, fall, and slide thereunder.

The theory of the defendant at the trial was that the

platform was covered with heavy frost, and the careless manner in which the plaintiff alighted from the train caused him to slip as he stepped upon the frosty platform, and his injuries resulted because of this dangerous natural condition over which the defendant had no control.

The record is quite voluminous and presents 42 separate assignments of error.

The defendant charges the lower court with error for refusing to order the case removed from the state to the federal court. This contention is entirely frivolous, since it is disclosed by the record that the federal court upon its own motion ordered the case remanded to the state court and dissolved an injunction in which the defendant sought to restrain the plaintiff from proceeding in the state court with the prosecution of the case. From this order of the federal court dissolving the injunction, the defendant prosecuted an appeal to the circuit court of appeals, which court affirmed the dissolution of the injunction by the lower court. The defendant made no further effort to have the case reviewed by the appellate court and the decision thereof became final.

Both at the close of plaintiff's testimony and at the end of the trial, the defendant moved the court to instruct a verdict in its favor because the testimony did not show the case to be one coming within the provisions of the federal employers' liability act; and error is assigned upon the overruling of this motion.

Two separate elements are involved in this contention. If the train was not engaged in interstate commerce, then it becomes immaterial how the injury occurred. If, however, the train was engaged in interstate commerce, then the question arises: Does the statute require that the injury must occur while the employee is handling interstate freight? From the undisputed facts in the record, it appears that this was a regular local freight train of the defendant company operating on its regular division, the southern terminal of which was Stanberry, Missouri, and the northern terminal Council Bluffs, Iowa. A freight train operating between those two points on its regular run is

an instrument of interstate commerce and at the time engaged therein as contemplated by the statute. *Chicago, R. I. & P. R. Co. v. Wright,* 239 U. S. 548; *Bower v. Chicago & N. W. R. Co.,* 96 Neb. 419. Therefore, the contention that the statute does not apply because the plaintiff received his injuries while he was engaged in unloading of purely intrastate freight is untenable. The record discloses that, if the plaintiff was performing any immediate service whatever for the defendant at the time he received his injuries, it was that of assisting in the unloading of two parcels of intrastate freight. The claim of the defendant is that the particular service which the injured employee was performing at the time of his injury under the statute must be the controlling fact in determining the applicability of the statute. The record shows without dispute that the plaintiff alighted from the train at the station where the accident occurred for the purpose of assisting in unloading two boxes of freight initiating at St. Louis, Missouri, and destined to Clyde, Missouri. The federal statute which we are called upon to construe, so far as concerns this particular question, provides as follows:

"Every common carrier by railroad while engaging in commerce between any of the several states or territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." 8 U. S. Comp. St. sec. 8657.

In order for a case to come within the provisions of the act, assuming the element of negligence, it will be noted that four essential facts must be concurrent: First, the defendant must be a common carrier by railway; second, must be engaged in commerce between states; third, the complainant must be an employee of the carrier; fourth, he must be injured by the carrier in interstate commerce. The defendant claims that the particular service which the

plaintiff was performing for the carrier when he received the injury was not a part of interstate commerce, and hence his case does not come within the act. We cannot adopt this view. It is not unreasonable to say that any common carrier by railway in the United States, whose system extends across state lines, may be engaged simultaneously in both interstate and intrastate commerce. To hold that the federal statute attempts to discriminate between cases where an employee is injured while handling a package of interstate freight and one of intrastate freight seems to us to be an unreasonable construction thereof. The statute provides that, if the injury occurs *"while he is employed by such carrier in such commerce,"* the statute becomes applicable. Under this language we are constrained to take the view that the word "employed" does not necessarily have reference to the particular service that the employee was performing when he received his injury, but to the general service that he is performing for the carrier, whether that of brakeman, fireman, engineer, or any other employment in which common carriers employ men. The test as to the applicability of the statute is determined by the relation the train itself sustains toward interstate commerce. If the instrument or agency of the carrier, at the time of the accident, was capable of being used for the transportation of commercial commodities, received at a point in one state and consigned to a point in another state, then such train is an instrument of interstate commerce, and during the time it is making its regular run from a point in one state to a point in another is engaged in interstate commerce. It then follows that, if a brakeman employed by the carrier is negligently injured by such train while it is thus engaged, the federal statute becomes applicable to the situation, even though the injuries were received while the employee at the time was engaged in the immediate service of handling intrastate freight. Defendant cites the case of *Illinois C. R. Co. v. Behrens*, 233 U. S. 473. That case is clearly distinguishable from the instant one. In the *Behrens* case all the cars in the train upon which a fireman

was killed were loaded with intrastate freight. Clearly, such a train is not an instrument of or engaged in the furtherance of interstate commerce. We think the rule has been very ably stated as follows:

"The service being rendered by an employee at the time of his injury may have a double aspect towards commerce. It may, as in that case, clearly be service in interstate commerce, yet at the same time be in furtherance of local commerce or of purposes not directly related to commerce of any sort. Yet, in such a case, participation in interstate commerce being shown, it is of no consequence, in determining the applicability of the liability statute, that he was also serving otherwise than in such commerce. And this is none the less true although the interstate service was in fact incidental to the other. The demands of the federal law being paramount, existence of interstate service in any degree controls the situation and renders the federal liability statute applicable. An extreme and a proper application of this principle is the following: A brakeman injured on a train containing nothing but intrastate shipments has no remedy under the federal act, but the minute that any species of merchandise destined to a point beyond the state is placed in that train, then, if the brakeman on that train is injured, he is engaged in interstate commerce, although every other commodity in that train is a shipment between two points in the same state." 2 Roberts, Federal Liabilities of Carriers (2d ed.) pp. 1375, 1376.

The supreme court of the United States, in discussing the purpose and applicability of the statute in question, states:

"Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable or more efficient. The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce. If the agents or instruments

are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not of the right kind or quality, commerce in consequence becomes slow or costly or unsafe or otherwise inefficient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce or make it less expeditious, less reliable, less economical and less secure." Second Employers' Liability Cases, 223 U. S. 1.

When this accident occurred the train stopped, the injured employee was taken back several miles to a hospital, the commerce of an interstate train was interfered with by this accident, and thus interstate commerce was interrupted. The service that the plaintiff was performing at the time was one so intimately connected therewith and incident thereto that it may logically be said to be a part of interstate commerce sufficient to bring the case within the provisions of the act. *Illinois C. R. Co. v. Behrens*, 233 U. S. 473; *Hensley v. Chicago, St. P., M. & O. R. Co.*, 118 Neb. 690; *Erie R. Co. v. Welsh*, 242 U. S. 303; *Illinois C. R. Co. v. Perry*, 242 U. S. 292.

In connection with the defendant's argument on this point, he claims that the depot platform is not within the provisions of the act. The statute makes use of the words *"works or other equipment"* in describing the property of the carrier upon which such a liability could arise. We take the view, and consequently hold, that the depot platform falls within the classification of "works or other equipment" as mentioned in the statute.

In view of the foregoing, the trial court committed no error in overruling the defendant's motion for a directed verdict.

The defendant asserts that the trial court committed error in permitting the witness Voyles to testify as to repairing the depot platform at the point where the injury occurred, after the accident. This witness, a bridge builder and carpenter for the defendant, was called to give testi-

mony on behalf of the plaintiff. He testified that he made an examination of the platform approximately two months after the accident occurred; that he discovered some stringers supporting the platform were decayed. On cross-examination he stated that he removed 16 or 17 feet of the platform floor, but gave no reasons for its removal. On redirect examination the plaintiff then went into the situation quite extensively. The witness was asked why he removed the boards, and he answered, to repair the platform and put in new sills. He was further asked if he replaced the sill shown in the picture, which the testimony shows was decayed, and he answered that he put in two more stringers immediately south of the one which the plaintiff contended was defective. There was no contention on the part of either of the parties that the platform floor was defective. The only reference made on cross-examination, brought out by the defendant, was that the witness removed some of the platform floor. It must not be overlooked that the plaintiff bases his right of recovery upon the claim that sills supporting the platform at the place of injury were so decayed that they did not properly, without sagging, bear the weight of the plaintiff. It was the plaintiff himself who elicited the testimony with reference to the extent, kind and reasons for making such repairs.

The rule seems to be quite universally accepted that evidence of subsequent repairs and precautions taken after an injury has occurred is not admissible. This rule reposes in sound reason and public policy. If the owner of property discovers that a third person has been injured by in some way coming in contact with such property, humanity requires that the owner take some precaution to prevent the recurrence of injury even though he may not be legally liable therefor. If the owner has to suffer a penalty for taking such precaution, such a rule would be against public policy and the courts quite universally condemn it for that reason.

To permit parading before a jury the humanitarian act of one who, after he has learned of an accident, honestly

endeavors to prevent its recurrence is entirely too unwholesome to have any standing in courts of justice. Certainly, the jury should not be permitted to speculate upon such a circumstance as being a confession of negligence. We think the reception of this testimony was highly prejudicial to the rights of the defendant and should have been excluded by the trial court. To admit it over the objection of the defendant constitutes reversible error.

"Evidence of subsequent repairs made or precautions taken after an accident or the infliction of an injury is not admissible to prove antecedent negligence."

"The testimony would naturally impel the jurors to believe the railway company had ascertained its fault and was endeavoring to repair its dereliction, hence without question it had admitted its negligence." *Pribbeno v. Chicago, B. & Q. R. Co.*, 81 Neb. 657. See *Tankersley v. Lincoln Traction Co.*, 101 Neb. 578; *Standard Oil Co. v. Tierney*, 92 Ky. 367; *Hodges v. Percival*, 132 Ill. 53; *Anson v. Evans*, 19 Colo. 274; *Sylvester v. Town of Casey*, 110 Ia. 256.

No further discussion of the various assignments of error is necessary. For reasons herein stated, the judgment is reversed and the cause remanded.

REVERSED.

The following opinion on motion for rehearing was filed December 5, 1930. *Former judgment of reversal vacated, and judgment of district court affirmed.*

1. Witnesses: EXAMINATION. Where, in the examination of a witness, a party inquires into and brings before the jury a part of a transaction, the opposing party is entitled to have disclosed the whole thereof.
2. ———: ———. In a personal injury action, evidence of subsequent repairs to the alleged defective instrumentality causing the injury is incompetent to prove negligence, but, if defendant, on cross-examination of a witness, brings before the jury the fact that subsequent alteration and repairs have been made, plaintiff may then, on redirect examination, show the reason for such repairs.
3. Appeal: VERDICT. In a personal injury action, an appellate court will not disturb a verdict as excessive, in the absence from

the record of anything indicating that the jury acted from passion, prejudice, or caprice, unless the court, as a matter of law, can say that the verdict is so excessive as to be unjust or unreasonable.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

GOOD, J.

This cause, while pending on motion for rehearing, has been reargued and will be treated as though a rehearing had been allowed. The former opinion appears *ante*, p.—, to which the reader is referred for a full statement of the issues and the facts.

In the light of further oral argument and aided by additional briefs, we have reexamined the entire record. In the former opinion all errors discussed, save one, were determined adversely to defendant. Reversal of judgment for plaintiff was directed on the proposition that the court committed prejudicial error in admitting evidence that, since the accident resulting in plaintiff's injury, defendant had repaired the alleged defects in its station platform. We are satisfied with the determination of the issues raised and discussed in the former opinion, save the one on which reversal was directed. These questions, therefore, will not be again discussed.

Plaintiff's injury occurred on December 13, 1926. A bridge carpenter in defendant's employ was a witness for plaintiff, and, without objection, testified that in March or April, 1927, he examined the platform and the stringers thereunder at the point where plaintiff slipped upon the platform and received his injuries. The witness identified a photograph of the premises, which photograph was taken shortly after the accident, and testified that it showed the condition of the platform and stringers as he observed them in March or April, 1927, and that the sill was "rotten, decayed." He was then asked to what extent it was rotten or decayed. Defendant objected for the reason that the examination was made by the witness several months after the occurrence of the alleged accident, and that evi-

dence as to the condition of the platform at the time of the examination by the witness was incompetent and immaterial. The objection was overruled, and the witness answered: "It was so rotten that it won't take the weight of the platform, the nails would not hold it in." On further inquiry he testified that the east end of the stringer, to the extent of six or seven feet, was fairly good, and, further, that four or five feet of the stringer was in the worst condition. The stringer to which this testimony related was the one next to the rail or outer edge of the platform. The witness was then asked as to the condition of the next two stringers nearest to the outer edge, and he testified: "They was rotten."

It will be observed that up to this point no question of repairs had been raised in the examination. On cross-examination, the witness testified as to how the platform was constructed; that the stringers or sills of the platform were 4-inch by 6-inch timbers, and that there were five stringers in the platform. He was further asked whether the planks constituting the surface of the platform were in good condition, and he answered: "They look like they was good." The following cross-examination appears: "Q. Well, were they, you were there? A. Yes, sir; I was there. Q. And were they solid planks? A. Lots of planks in platforms look good until you go to take them out. Q. I am speaking about the fact as shown in this photograph and your observation there. A. You want to know, was they good? Q. Were they solid planks, I mean the two-inch planks, were they solid planks? A. No, sir; they was not good planks. Q. And did you remove any of those planks? A. Yes, sir. Q. How many did you take up? A. We took up around 16 or 17 foot of that platform." On redirect examination he was asked: "You say you removed the boards of the platform? A. Yes, sir. Q. Why did you do that? A. To repair the platform, put in sills. Q. Put in new sills? A. Yes, sir. (Up to this point no objection had been interposed on redirect examination.) Q. Did you replace the sill that was at the place shown between the two upright pieces in exhibit 4?" Defendant objected as in-

competent, irrelevant and immaterial. For the first time objection was made that it was not proper to show subsequent repairs as indicative of negligence at the time of the accident.

It will be observed that the question of the removal of the planks from the platform was brought out by defendant. The witness had previously testified, on direct examination, as to the rotten condition of the stringers. When defendant went into the question of removal of the planks, we think it opened up the subject of repairs.

Section 8849, Comp. St. 1922, in effect, provides that, when a part of an act or transaction has been given in evidence by one party, the whole subject may be inquired into by the other party. Defendant brought out a part of the transaction, and plaintiff was entitled to have the whole transaction disclosed to the jury. We think there was no error in the ruling of the court in this respect. In the direct examination of the witness plaintiff scrupulously refrained from any reference to repairs made in the platform, and limited the examination of the witness to what he found as to the condition of the stringers under the platform. Defendant then showed the alteration and the removal of a part of the platform. The reason for such act was a proper subject of inquiry on redirect examination.

An assignment of error, not discussed in our former opinion, is that the verdict is so excessive as to appear to be the result of passion or prejudice. The verdict was for $24,375. It seems large, but plaintiff's injuries and resulting damages are great. He is 24 years of age and unmarried. He has lost a leg and must go through life a cripple. He will be forever barred from many lines of gainful employment, and his earning capacity will be greatly reduced in such occupations as will be open to him. His opportunity for contracting a desirable matrimonial alliance will be lessened. The humiliation of being maimed will be ever present. He has suffered intense and excruciating physical pain. The stump of his leg is in such condition that he cannot continuously wear an artificial limb

unless he submits to a further surgical operation to remove more of the bone and provide an adequate flap or cushion. It must be remembered, too, that there is no definite rule by which to measure damages in such a case. It is usually left to the sound discretion of the jury to determine the amount. Unless there is evidence to indicate that the jury acted from caprice, passion, or prejudice, a reviewing court will not disturb the verdict, unless it can say, as a matter of law, that the verdict is so excessive as to be unjust and to require a remittitur or reversal. From a careful review of the entire record, we are unable to say that there is any evidence that the jury acted from passion, prejudice, or caprice, and we are unable to say, as a matter of law, that the verdict is so excessive as to require a remittitur or reversal.

Other assignments of error, not discussed herein, have received consideration. No prejudicial error has been found.

That part of our former opinion which holds that there was prejudicial error in the reception of evidence and the judgment of reversal are withdrawn; in other respects the opinion is approved.

The judgment of the district court is

AFFIRMED.

HENRY F. PETERS, APPELLEE, V. FRED L. POTHAST, APPELLANT.

FILED JULY 11, 1930. No. 26899.

1. **Venue: SUMMONS TO ANOTHER COUNTY.** In an action *in personam*, a summons cannot be lawfully sent to a county other than the one where the action is pending, unless there is a joint demand against the nonresident defendant and the defendant summoned where the action was commenced.
2. **———: JURISDICTION: HOW QUESTIONED.** Where a joint liability is alleged in the petition against a resident defendant and a defendant in a county other than where the action is commenced, and the jurisdictional defect does not appear on the face of the record, the nonresident defendant may challenge the jurisdiction of the court over his person, together with such other defenses

as he may have, in the answer, without raising the jurisdictional question by special appearance or other preliminary pleading.

———: SUMMONS TO ANOTHER COUNTY. To authorize summons to another county in a personal action for the recovery of money only, there must be an actual right to join the resident and nonresident defendants. To maintain an action of this character against the nonresidents served in another county depends upon the plaintiff really having a right to recover from the resident defendant jointly with the others.

APPEAL from the district court for Lancaster county: MASON WHEELER, JUDGE. *Reversed and dismissed.*

Jack & Vette, Clifford L. Rein and *Sanden, Anderson, Laughlin & Gradwohl,* for appellant.

Brown & Dibble, contra.

Heard before GOSS, C. J., DEAN, GOOD, and EBERLY, JJ., and RHOADES, SPEAR, and TEWELL, District Judges.

RHOADES, District Judge.

This action is one to recover damages for alleged fraudulent representations of defendants in the exchange of real estate with the plaintiff. Ira M. Hadley, Fred L. Pothast, Dick Reil, and Farmers State Bank of Pickrell were named as defendants. The trial court sustained defendant Reil's demurrer to the petition and dismissed the action as to him, directed a verdict and dismissed the action as to defendant Farmers State Bank of Pickrell; and the issues presented by the answer of defendants Ira M. Hadley and Fred L. Pothast were submitted to a jury, who returned a verdict in favor of plaintiff and against the defendant Fred L. Pothast in the sum of $1,250, and returned no verdict either in favor of or against the defendant Ira M. Hadley. Judgment was entered on the verdict in favor of the plaintiff and against the defendant Fred L. Pothast on October 11, 1928, and on November 17, 1928, the trial court dismissed the action as to the defendant Ira M. Hadley. All of the judments except that against defendant Fred L. Pothast have become final, and the only party appealing is the defendant and appellant Fred L. Pothast.

Various assignments of errors have been urged, but as the case turns upon the question of jurisdiction that one alone will be considered.

This action was instituted in the district court for Lancaster county, the residence of defendant Ira M. Hadley, where personal service was had upon him. Summons was thereupon issued out of Lancaster county and served in Gage county upon defendant Fred L. Pothast, the county of his residence. The defendant Fred L. Pothast did not appear by special appearance challenging the jurisdiction of the court over his person, but filed his answer wherein, among other defenses interposed, he pleads in substance that the defendant Ira M. Hadley is not a real defendant in said action, but was made such for the sole and only purpose of obtaining jurisdiction of the defendant in Lancaster county. Appellant contends that, whereas the district court for Lancaster county had jurisdiction over the Gage county defendant only in the event that a joint liability existed between Hadley, the resident defendant, and the Gage county defendant, and the jury not finding against the resident defendant and the trial court dismissing the action as against him, conclusively establishes that no joint liability existed and the judgment against appellant cannot stand for the reason that the court had no jurisdiction over his person. We are of the opinion that the point is well taken.

The jurisdictional question involved did not appear on the face of the record and is one which would not ordinarily be reached by a special appearance. If the objection to the jurisdiction had been evident on the face of the record, defendant should have raised it before pleading to the merits. *Stull Bros. v. Powell*, 70 Neb. 152. But it is the settled rule of this court that, where a joint liability is alleged in the petition against a resident and nonresident defendant, it is proper to raise the question of jurisdiction by answer, and where it appears upon the hearing that there is no joint liability jurisdiction is denied.

In *Vian v. Hilberg*, 111 Neb. 232, this court ruled that, where the facts are not apparent upon the face of the

record, the right of the objecting defendant to raise the question of jurisdiction over his person is not waived by failure to file a special appearance, but is properly raised by answer. This rule is likewise announced in *Stull Bros. v. Powell, supra, Bailey v. Chilton,* 106 Neb. 795, and *McNeny v. Campbell,* 81 Neb. 754.

In *Gaines v. Warrick,* 113 Neb. 235, this court held: "If the lack of jurisdiction over the person of defendant does or does not appear on the face of the record, it may be raised by special appearance, and error, if any, committed in the overruling thereof is not waived by answering over, where the objection is pleaded in the answer."

In *Smith v. Atlas Refining Corporation,* 112 Neb. 6, it was held: "Where a jurisdictional defect does not appear upon the record but must be proved, it is proper to plead the lack of jurisdiction in the answer, and by so pleading the defense of lack of jurisdiction is preserved."

In the case at bar the jury returned a verdict against the defendant Fred L. Pothast. The verdict was silent as to the defendant Ira M. Hadley. It was received by the court without objections or questions by the parties. Subsequently the trial court dismissed the action as to defendant Hadley. Of course, it goes without saying that the court should not have received the verdict without correction; but it was received without objection from counsel, and we must presume that it was satisfactory to all concerned. The presumption is that the jury found in favor of the defendant not referred to in the verdict. *Cox v. Ellsworth,* 97 Neb. 392. Since this is true, the only remaining question is whether or not upon the return of the verdict which negatives a joint liability defendant Pothast is entitled to a dismissal. We think he is. Defendant Pothast, who, as we have seen, was not a resident of the county in which this action was brought and was not served with process there, filed a separate answer in which he interposed a plea to the jurisdiction of the court over his person. The principal question is that of jurisdiction of the court to render judgment against him. The action is purely *in personam* and for the recovery of money only,

and does not fall within any exception to the general rule formulated in the Code, which requires an action to be brought in the county in which the defendant, or some one of the defendants, resides, or may be summonded. In *McKibbin v. Day*, 71 Neb. 280, it is said:

"To authorize summons to another county in personal actions for the recovery of money only, there must be an actual right to join the resident and nonresident defendants. In the body of the opinion (*Stull Bros. v. Powell*, 70 Neb. 152) it is said, in effect, that the right to maintain an action of that character against the nonresidents served in another county, would depend upon the plaintiff really having a right to recover from the resident defendants jointly with the others."

In the case at bar, that the plaintiff did not "really" have such a right seems to be established by the verdict of the jury. It necessarily follows that, the plaintiff having no cause of action against the resident defendant, no joint liability existed, and a summons cannot be lawfully sent to a county other than the one where the action is pending, unless there is a joint demand against the nonresident defendant and the defendant summoned where the action was commenced. *First Bank of Ulysses v. Warren*, 113 Neb. 361. The service of process upon appellant in Gage county was unwarranted, and the district court for Lancaster county acquired no jurisdiction over his person, and should have dismissed the action as against him, when it was determined that the plaintiff was not entitled to recover from the resident defendant Hadley.

The rule herein announced is not in conflict with the rule of this court that, where a defendant appears specially objecting to the jurisdiction of the court over his person and by such appearance or motion invokes the judgment of the court in any manner, upon any question, except that of the power of the court to hear and decide the controversy, such appearance is general.

This court, in *Maxwell v. Maxwell*, 106 Neb. 689, held that, where a defendant objecting to the jurisdiction of the court over his person pleads matters amounting to a

demurrer to the petition, his appearance is general and the court has jurisdiction of his person. Under such condition of the record a defendant is deemed to have entered a general appearance and, in that event, reserving the objection in his answer is of no avail.

In the case at bar appellant did not file a special appearance, nor did he enter a general appearance, but interposed his objection to the jurisdiction of the court over his person in his answer, based upon the fact that there was no joint liability of the resident defendant, and the trial court having dismissed the action against the resident defendant, and appellant not having theretofore entered a general appearance, such judgment of dismissal against the resident defendant having become final and not subject to review by this court, it necessarily follows that no joint liability existed.

For the reasons given, it is our opinion that the district court for Lancaster county acquired no jurisdiction over the person of Fred L. Pothast, and the judgment is reversed and the action dismissed.

REVERSED AND DISMISSED.

PAUL JUCKNIESS, APPELLEE, V. GLENN HOWARD, APPELLEE: J. DAN LAUER, APPELLANT.

FILED JULY 11, 1930. No. 27231.

1. **Continuance:** UNFORESEEN CALAMITY. Where, during the progress of the trial, the defendant becomes, through an unforeseen calamity, unable to attend or assist in the trial of his case, ordinarily it is the duty of the court, upon proper and timely showing, to continue the trial.
2. **Appeal:** INSANE DEFENDANT. Where it is established that a cause has proceeded to judgment against a litigant, who during the course of the trial became and remained mentally incompetent without a guardian or guardian *ad litem* for the protection of the insane litigant, the judgment should, upon proper showing, be set aside and a new trial granted.

APPEAL from the district court for Saunders county: LOVEL S. HASTINGS, JUDGE. *Reversed.*

Stewart, Stewart & Whitworth and *Hendricks & Kokjer*, for appellant.

Wear, Moriarty, Garrotto & Boland, Slama & Donato, J. C. Bryant, H. A. Bryant and *L. R. Doyle, contra.*

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON and DAY, JJ., and JAMES and WRIGHT, District Judges.

WRIGHT, District Judge.

This action was brought by the appellee, Paul Juckniess, against the appellant, J. Dan Lauer, and appellee, Glenn Howard, Juckniess claiming that the concurring negligence of Howard and Lauer in the operation of their respective automobiles resulted in his damages, which he sought to recover. Howard, defendant below, whose car was being driven by his daughter, denied negligence on her part, and alleged negligence on the part of Lauer, also defendant below, resulting in damages, for which he asked judgment against Lauer. By agreement, the claims between the respective parties were submitted in the same trial, with the result that Juckniess and Howard each recovered judgment against Lauer, appellant. Juckniess' action against Howard was dismissed.

The trial lasted two days. We gather from the record that the appellant was present with his counsel during all of the first day. In the afternoon he showed erratic symptoms when he undertook to take the cross-examination of a witness from his attorney and himself assume charge. He so behaved that it became necessary for the court to admonish him, and he was told that as long as he had counsel representing him he could not, himself, examine the witness. He then subsided. That evening, when his counsel undertook to discuss with him the facts, he appeared dazed and confused and apparently could not talk connectedly. He left his counsel, with the agreement to meet at their office at 8:30 the next morning, but instead of meeting the appointment, he, without their knowledge, and apparently acting under the delusion that the case had been settled, took passage for Lincoln at 8:30, arriv-

ing shortly after 10 o'clock in the forenoon on March 6, 1929.

On the opening of court on the second day, that is, the day appellant had left for Lincoln, appellant's counsel informed the court of these facts, stating that no settlement of the case had been made or entertained; that in their opinion he was mentally incapacitated; and asked for time to make a showing for a continuance. This request being denied, the trial proceeded throughout the day. At the close of the testimony, counsel for appellant asked leave to withdraw a juror and moved that the case be continued. With this motion was submitted a showing as to appellant's mental condition. The affidavit of Dr. Thompson, who examined appellant at 10:30 in the morning of March 6, the second day of the trial, upon his arrival at Lincoln, avers that he then found him "in a highly acute nervous condition, which has so affected his mental condition as to make him irrational and irresponsible." He further states that he was then unable to say how long this condition would continue, but in his opinion he would not be competent to testify for at least thirty days.

Additional proof as to appellant's mental condition was made in support of the motion for a new trial submitted and overruled on June 14, 1929. Dr. Thompson supplemented his affidavit, already submitted, by a second affidavit, in which he said that at that time appellant's condition had improved, and "that in a few months, the exact number of which affiant cannot definitely state, said Lauer may again be rational, responsible, and competent." He further states that the disease from which appellant is suffering is not of an incurable nature.

Appellee, in resisting motion for a new trial, submitted the affidavit of Dr. Mayhew, who on the 8th day of May, 1929, about a month after the trial, saw the appellant in the hospital, "where he had been suffering from a chronic nervous disease which renders him entirely irrational and incompetent mentally." And he adds: "In my opinion never will be in a competent mental condition such as he was previous to the 1st of March, 1929."

There can be little doubt that the appellant, during the course of the trial, became at least temporarily insane, and that his absence during the second day of the trial was not voluntary but due to circumstances beyond his control.

Two assignments of error are presented: First, that the court erred in denying appellant's application for a continuance, made during the trial; and, second, that the court erred in overruling appellant's motion for a new trial.

This court, in an early case, *Johnson v. Dinsmore,* 11 Neb. 391, discussing the duty of the trial court in matters of this kind, said:

"It is said that an application for a continuance is addressed to the sound discretion of the court, and that its action thereon cannot be reviewed. But this is stating the rule too broadly. The object of the law is to administer justice, and where it clearly appears from all the facts and circumstances in the case that there has been an abuse of discretion operating to the prejudice of the party in the final determination of the case, the court, in a proper case, will grant a new trial." And later adds: "However desirable it may be to have business in court disposed of rapidly, it is of much greater importance that justice be administered, and that the court do not become the instrument for depriving a party of his rights."

There are many cases where the right to a continuance is considered solely from the position of a party unable to produce the testimony because of the absence of a witness. Under ordinary circumstances this testimony can be supplied, in a measure, at least, by admissions as to the testimony of such absent witness, and that is generally deemed sufficient. The trial court evidently viewed this case from that standpoint, and announced that a continuance would be granted unless such admissions were made. The admissions having been made, the motion for a continuance was overruled.

Another situation, however, arises when the absent person is a party to the litigation, as in this case. Here the litigant has been deprived, not only of his right to testify in person, which might be supplied by the admissions, but

also of the important right to be present and advise with his counsel during the course of the trial. In *Horr v. Easton,* 114 Neb. 829, this court held that where, before the time set for the trial, a defendant becomes ill and is unable to attend court at the time fixed therefor, and that fact is established by his own affidavit, that of his counsel and his attending physician, ordinarily it is error for the trial court to proceed to trial in the absence of such defendant, and quote with approval from *In Re Townsend's Estate,* 122 Ia. 246, as follows:

"Her counsel were entitled to her presence, counsel and advice during the entire trial. The evidence discloses that she knew more about the real issues than any one else, and, while she may have been incompetent as a witness to testify to many of these matters, there was the more need for her advice and counsel during the trial."

Further, in support of the rule in the same case, this court adopted so much of the opinion in *Mathews v. Willoughby,* 85 Ga. 289, where it is said:

"A continuance should have been granted on motion properly showing, on the call of the case, that the defendant was sick with pneumonia and would be unable to attend court for five or six days, in connection with his counsel's statement that he could not go to trial without the presence of his client; the only counter showing being to the effect that the defendant was seen two days before, going from his home."

In *Jaffe v. Lilienthal,* 101 Cal. 175, that court, in passing upon a similar question, said:

"It seldom happens that a trial can be properly had in the absence of the plaintiff, even when he is disqualified as a witness, especially where it is to be tried upon oral testimony. With all the care that can be reasonably taken by both attorney and client, some matter of vital importance is liable to be overlooked by them until the trial calls it to the recollection of the plaintiff, and this is especially true in relation to matters purely in rebuttal. It is the right of parties to be present at the trial of their cases. This right may be waived, and should be held to be waived

where the absence of the party is voluntary and under circumstances which ought not to induce a reasonable man having a due regard for the rights and interests of others and of the public, all of whom are interested in the due and prompt administration of justice, to absent himself."

In *McMahan v. Norick*, 12 Okla. 125, it is said:

"It is true that the defendant in error consented that the affidavit of the plaintiff in error may be treated as her deposition, but this fact did not satisfy the law. The plaintiff in error had a right to be present when she was able to attend court, and not only testify in her own behalf, but to assist counsel in the presentation of said cause."

Many cases may be found sustaining a refusal of a continuance in the case of the absence of one of the parties where such absence is either voluntary or due to negligence. The justice of the rule is apparent. But in the present case, where the defendant had, during the course of the trial, through an unforseen calamity and through no fault of his own, been deprived of the right to be present and participate, it became the duty of the court to protect him by granting the continuance asked, and a failure so to do, upon application of counsel, amounted to an abuse of discretion. Having denied the continuance, the motion for a new trial, made later, should have been sustained.

There is another view of the case which should be taken into consideration under the facts shown. The trial proceeded to judgment against a defendent mentally incompetent. In *Simmons v. Kelsey*, 72 Neb. 534, where the question of the rights of an incompetent person, a party to litigation before the court, were involved, this court said:

"If before the termination of the litigation she shall become incapacitated, a duty will devolve upon the court, as the general conservator of the estates of all persons under disabilities, to see to it that her rights and estate are protected and preserved, either by a general guardian or by a next friend or guardian *ad litem* appointed by the court for the purposes of the action."

And in the case of *Graves v. Graves,* 255 Mo. 468, that court said:

"If no guardian *ad litem* was appointed, then the lunatic never had his day in court in the full sense of the term."

In the present case, the appearance by attorneys appointed during the sanity of the party would not be sufficient. It is a general rule that, where a principal becomes insane or otherwise mentally incapacitated before the agent has performed his undertaking, then the agency would be at least suspended by operation of law. Where such a situation is presented to a court, as was in this case, by the motion for a new trial, the judgment obtained under such circumstances should not be permitted to stand.

For the reasons stated, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

H. J. PETERSEN ET AL., APPELLEES, V. CITY OF OMAHA, APPELLANT.

FILED JULY 17, 1930. No. 27311.

1. **Municipal Corporations:** CONTRACTS: DEFERRED PAYMENTS: INTEREST. Contractors for a municipal improvement are not generally entitled to interest on compensation during the time the city, acting in good faith in strict compliance with the contract, temporarily withholds payments as indemnity for damages resulting from the work of construction.
2. **Contracts:** CONSTRUCTION. To reconcile seeming inconsistencies in provisions of a written contract, when segregated from the context, the instrument should be considered in all its parts, and mutual interpretation of the parties as indicated by what they did under it, as well as fair dealing and intention, if discernible from the writings as a whole, may be also considered.
3. **Municipal Corporations:** SEWER CONTRACT: CONSTRUCTION. In a contract to construct a municipal sewer, provisions disallowing extra compensation for sheeting left in the trench and including payment therefor in the price for constructing the sewer by the lineal foot, and other provisions requiring payment for sheeting left permanently in the trench by order of the city engineer, *held* reconcilable by an interpretation that the

former applies to lumber voluntarily left in the trench by the contractors and the latter to lumber left there by order of the city engineer.

4. ———: ———: PAYMENTS: INTEREST. As a general rule, stipulated compensation for work and materials furnished by contractors in performing their contract for a municipal improvement draws interest from the time payment is due thereunder and unpaid, in absence of an agreement to the contrary, where the delay is unreasonable and the amount for which the city is in default is liquidated or definitely ascertainable.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Reversed, with directions.*

John F. Moriarty, T. J. O'Brien and *B. J. Boyle,* for appellant.

L. J. TePoel and *W. H. Herdman, contra.*

Heard before ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ.

ROSE, J.

This is an action by contractors to recover a balance due them on their contract to construct Grace street storm sewer in Omaha for $124,029.20. H. J. Petersen and James Jensen were contractors and are plaintiffs. The city of Omaha is defendant. Claims for the unpaid balance due on the contract were presented by plaintiffs to the city council and disallowed. They appealed to the district court where a judgment was entered in their favor for $2,801.49. This sum is composed entirely of interest amounting to $342.33 on delayed payments as the work progressed and of an item, listed in the contract under the head of "Extras," for sheeting lumber left in the trench by order of the city engineer, the amount of the latter item as allowed by the district court being $2,052.24 for 34,204 feet at $60 a thousand, board measure, and interest thereon in the sum of $406.92 from November 1, 1926, to September 1, 1929, or $2,459.16, principal and interest. From the judgment in favor of plaintiffs for $2,801.49, defendant has appealed.

The allowance of interest is challenged by defendant as erroneous. On the other hand, plaintiffs take the position that they were entitled to recover interest on account of delays in payments when due after the sewer was completed and accepted, citing, among other cases, *Murphy v. City of Omaha*, 33 Neb. 402.

The contract was executed September 19, 1925, and the sewer was completed October 25, 1926. The contract does not contain in direct terms a provision for the payment of interest. On estimates plaintiffs were entitled to payments as the work progressed. Measured by stipulated compensation for completion of the sewer itself, there was a balance of $33,722.45 due plaintiffs October 25, 1926. Defendant made estimates and corresponding payments therefor as follows: January 7, 1927, $15,093.90; September 12, 1927, $11,935.43; September 19, 1927, $6,693.12; total, $33,-722.45, excluding interest. For delays in making payments during the progress of the work, were plaintiffs entitled to interest? Prior to the payments made, was the city in default within the meaning of the statutes creating a liability for interest and entering into the contract for the improvement? While the sewer was completed and accepted October 25, 1926, plaintiffs had not then fully performed their contract, which must be considered in its entirety. It contained provisions requiring them to protect the city against damages resulting from excavations and authorized the city to indemnify itself by temporarily withholding payments. As a result of the excavating for the sewer, the surface of a paved street fell below the established grade. Street car tracks were injured. Curbs and sidewalks were disturbed. Owners of adjacent property complained of injuries. Claims for damages were presented to defendant. To ascertain the extent of such damages the city conducted an official investigation and its officers made a tentative estimate of $7,000 to replace the pavement and of $11,000 to cover the claims of property owners. Funds in control of the city for payment of the contractors were released as the claims for damages were paid, adjusted or abandoned. Though plaintiffs appear to have been diligent in adjusting

such claims, their own testimony shows that they commenced to restore the pavement April 30, 1927, and did not complete it until June 20, 1927. There is testimony tending to show that the broken pavement was not completely restored until September 2, 1927, just 17 days before the final estimate of $6,693.12 due plaintiffs was made. It may fairly be inferred that the city did not previously know the exact amount payable to plaintiffs under the contract as a whole in view of its right to withhold payments as contractual indemnity for damages. The exact amount which the city should release for payments to plaintiffs was not ascertainable while claims for unliquidated damages were pending. There is nothing to show bad faith of defendant in temporarily withholding payments for indemnity. There was no evidence of unreasonable delay. In the meantime the city was not in such default as creates a liability for interest on delayed payments. With the exception of the final estimate, plaintiffs accepted all payments as the work progressed without making any demand for interest. The law applicable has been stated as follows:

"It may be stated as a general rule, however, that interest is not allowed on unliquidated damages or demands, for the reason that the person liable does not know what sum he owes, and therefore can be in no default for not paying. The damages in such cases are generally of an uncertain quantity, depending upon no fixed standard, and can never be made certain except by accord or verdict or decree; and hence, where this is the condition, they are not allowed, either in actions arising from a breach of contract, or on tort." 8 R. C. L. 533, sec. 86. See, also, note in 3 A. L. R. 809-819.

Murphy v. City of Omaha, 33 Neb. 402, cited by plaintiffs is not controlling on this feature of the present case. Plaintiff therein had fully performed the contract. The amount then due was definitely known. The city had no right to withhold payments for indemnity against damages. There was no justification for non-payment or delay upon completion and acceptance of the work.

The conclusion is that the trial court erred in allowing interest to the extent of $342.33 on the delayed payments mentioned, excluding the claim for lumber.

Was the claim for sheeting lumber left in the trench by order of the city engineer a valid obligation of the city in addition to the contract price of $124,029.20 for the construction of the sewer? The bid of plaintiffs was made on a form which the city required them to use and is a part of the contract. Under the separate head "Extras," following a line calling for a bid on lumber per thousand feet, board measure, the entry was "60," written in a column under "dollars." Bids were specifically required on every item. This bid was accepted as made. The specifications are also parts of the contract and one of them contains printed matter in the following language:

"Sheeting left in permanently under direction of the city engineer, and only such, will be paid for at the price bid."

On a blue print constituting a portion of the plans for the improvement, and also a part of the contract, are the following entries on the margin:

"Sheeting and Bracing: No extras will be allowed for sheeting and bracing left in the sewer trench and in tunnel.

"Bracing that may be required in the tunnel shall be included in the price bid per lin. ft. of sewer and no extras will be allowed for same or for the placing of same."

Defendant contends that the foregoing wording copied from the plans is in writing and that the written provisions introduced by the catchwords "Sheeting and Bracing" prevail over inconsistent terms of the printed matter quoted from the specifications. In other words, the contention is that expressions disallowing, as extras, payments for sheeting and bracing left in the trench and including the price therefor in the bid for constructing the sewer by the lineal foot prevail over the accepted bid for such lumber at $60 per thousand feet and also prevail over the printed specification that payment therefor will be made on the basis of the price bid for extras. In this connection defendant invokes the following statutory rule:

"When an instrument consists partly of written and partly of printed form, the former controls the latter, where the two are inconsistent." Comp. St. 1922, sec. 8850.

Within the meaning of the statute, it is at least questionable whether the terms appearing on the blue print surpass other printed matter in dignity and effect. There is nothing in the record to indicate that plaintiffs ever saw the original manuscript reproduced in the form of the blue print. The quoted stipulations thereon are printed, not written. The blue print itself, not the original drawing or writing, is a part of the contract executed by the parties. It is unnecessary, however, to pass on this question, because the solution is found in well-settled principles of law applicable to the construction of written instruments. The entire contract should be considered in giving effect to doubtful or ambiguous terms. The provisions giving rise to controversy should be viewed in the light of the entire instrument to reconcile seeming inconsistencies in segregated terms. Mutual interpretation of the parties as evidenced by what they did under the contract may be considered. Fair dealing and intention, if discernible from the entire instrument, may also be considered.

The contractors were required to cut a trench 40 feet deep. In making it they used 34,204 feet of lumber and the city engineer ordered them to leave it there, as he was permitted to do under the contract. At the price bid the amount of the claim therefor was $2,052.24. These facts are undisputed. By lineal foot for the sewer plaintiffs could not make a conservative, intelligent bid for lumber involuntarily left in the trench, because they had no means of knowing in advance how much the city engineer would direct them to leave. In that situation they were required by the city to bid for the lumber sheeting by the thousand feet, board measure, under the head of extras and their bid was accepted and made a part of the contract. After they were directed by the engineer to leave the lumber in the trench, the city calculated the amount thereof, thus indicating an interpretation that payment should be made accordingly. Otherwise the city thus performed an idle task,

since the amount of the lumber left in the trench was immaterial, if payment therefor were included in the bid for construction of the sewer by the lineal foot. The interpretation now invoked by defendant would eliminate from the contract the accepted bid by plaintiffs for lumber under the head of extras and would also strike out the specification for the payment of the lumber at the price bid. Properly construed there is no inconsistency between the terms in controversy. The provisions upon which defendant relies apply alone to sheeting and bracing voluntarily left in the trench by the contractors, while the specification challenged as inconsistent applies to lumber left therein by order of the city engineer. This construction makes the contract consistent in all its parts, gives effect to every provision, is in harmony with business rectitude and conforms to fairly expressed intentions as shown by mutual understanding of the parties during the progress of the work.

It was the duty of the city to include in its final estimate September 19, 1927, the claim of plaintiffs for $2,052.24 and to pay the same on that date. The amount due plaintiffs for lumber left in the trench under the direction of the city engineer was then definitely ascertainable under the terms of the contract which was fully performed on their part. They are therefore entitled to interest from that date. *Murphy v. City of Omaha*, 33 Neb. 402.

The judgment of the district court is reversed and the cause remanded, with directions to enter a judgment in favor of plaintiffs and against defendant for $2,052.24 with interest thereon at the rate of 7 per cent. per annum from September 19, 1927; the parties to pay their own costs in the supreme court.

REVERSED.

IN RE ESTATE OF THOMAS V. GOLDEN.
L. J. SPITTLER ET AL., APPELLANTS, V. MARTINA G. DISHNER, ADMINISTRATRIX, APPELLEE.

FILED JULY 17, 1930. No. 27371.

1. **Courts**: RIGHT OF APPEAL. The constitutional and statutory right of appeal from the county court to the district court applies to a final order in the administration of the estate of a deceased person.
2. **Executors and Administrators**: ADMINISTRATION OF ESTATES: BELATED CLAIMS. Permission by the county court to file a claim against the estate of a deceased person after expiration of the time-limit for filing claims is an essential step in a proceeding to allow a belated claim.
3. **Appeal**: FINAL ORDER. Permission to file in the county court a belated claim against the estate of a deceased person is not a final or appealable order.
4. **Executors and Administrators**: ADMINISTRATION OF ESTATES: BELATED CLAIMS: REVIEW. An order of the county court, permitting a claimant to file a claim against the estate of a deceased person after expiration of the time-limit for filing claims, may be reviewed in the district court upon appeal from a final order allowing such claim.
5. ———: ———: ———: APPEAL: TRIAL DE NOVO. An appeal from the final judgment of a county court, allowing a belated claim as a charge against the estate of a deceased person, authorizes a trial *de novo* in the district court, including the issue raised by the application for an interlocutory order permitting the filing of the claim and objections thereto.
6. ———: ———: BAR OF CLAIMS. Claims against the estates of deceased persons are forever barred, unless presented within the time allowed by the county court for the filing of claims, or unless permission to file belated claims is granted pursuant to statute for good cause shown.
7. ———: ———: STATUTE OF NONCLAIM. The statute of nonclaim is generally more rigorously applied than the general statute of limitations.
8. ———: ———: BELATED CLAIMS: DISCRETION OF COURT. The jurisdiction of the county court to permit the filing of a belated claim against the estate of a deceased person depends upon good cause shown, and in the absence thereof there is no judicial discretion for the granting of such permission.
9. ———: ———: ———: SHOWING. Good cause for granting permission to file a belated claim against the estate of a deceased person is analogous to that required by a court of

equity in granting a new trial in an ordinary case, and evidence outlined in opinion *held* insufficient for that purpose.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

J. D. Cronin and *J. A. Donohoe,* for appellants.

Lewis Chapman, W. J. Hammond and *M. F. Harrington, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

ROSE, J.

This is a proceeding by creditors for the allowance of a claim against the estate of a deceased person after expiration of the time limited by order of the county court for the presenting of claims and for the barring of unfiled claims.

Thomas V. Golden died intestate January 22, 1928. Martina G. Dishner was appointed administratrix of his estate by the county court of Holt county February 23, 1928. Creditors were required by a formal order to present their claims within three months from March 22, 1928, after which time, said the county court, "all claims are barred." Notice of the order was published according to law in The Frontier, a newspaper printed at O'Neill, the county seat. Later in the same proceeding the following order was made by the county court:

"Now on this 26th day of June, A. D. 1928, this cause came on for hearing, and it appearing to the court that the time limited for filing claims against said estate has expired and that due notice to creditors to present their claims has been given, it is, therefore, hereby ordered that all claims against the estate of Thomas V. Golden, deceased, which were not filed within the time provided by the order of this court, be, and they hereby are, forever barred."

September 12, 1928, after expiration of the time-limit for presenting claims, Spittler Brothers, merchants of Ewing, Holt county, applied to the county court for an order granting them permission to file a claim for $3,113.68 against the estate of decedent. The application was ac-

companied by an affidavit stating in substance that the claim was valid, due and unpaid, and that claimants had no knowledge of the proceedings in the county court or of the published notice, as it had not appeared in the Ewing newspaper. The administratrix objected to the granting of permission to file the claim on the grounds that it was barred by the county court's order pursuant to the non-claim statute and that claimants had knowledge and timely notice of the time fixed for the filing of claims. Permission to file the claim was granted by the county court January 8, 1929. By proceedings in error and by appeal the administratrix invoked the jurisdiction of the district court for Holt county to reverse the order permitting the claim to be filed. The proceeding in error and the appeal were both dismissed on motion of claimants for the reason that the order allowing the filing of the claim was not a final or appealable order. July 22, 1929, after the controversy reappeared in the county court and after issues as to the filing and the allowing of the claim were raised there by formal pleadings, a trial resulted in its allowance and in a judgment against the Golden estate and in favor of Spittler Brothers, claimants, for $2,331. The administratrix appealed therefrom to the district court where there was a finding that the claim was barred by the order of the county court. From a judgment denying the application for permission to file the claim, Spittler Brothers appealed to the supreme court.

An assignment of error is directed to an order of the district court overruling an objection to a trial *de novo* of the issue raised by the application for permission to file the claim after expiration of the time-limit and the objections thereto. Claimants argue that this assignment of error should be sustained, because the county court exercised a judicial discretion in granting leave to file the claim; because the evidence upon which the county court acted in allowing the claim to be filed did not appear on the face of the record before the district court on appeal, since the evidence was not preserved by a bill of exceptions nor presented by proceedings in error; because the district court

on appeal, in absence of a bill of exceptions and a petition in error, had no means of determining whether the county court abused its discretion in permitting the belated claim to be filed; because the administratrix, by her appeal from the allowance of the claim itself, waived all irregularities preceding such final order allowing the claim; because the appeal by the administratrix was from such final order and not from the permission to file the claim. The fundamental question to which the argument is principally directed may be reduced to this form: Did the appeal by the administratrix from the final order allowing the claim to the extent of $2,331 as a valid charge against the estate of decedent authorize a trial *de novo* in the district court of the issue relating to permission to file the claim after expiration of the time-limit?

The right of appeal from the county or probate court to the district court is granted in specific terms by the Constitution, which provides that in all civil cases appeals from the county court to the district court are allowed on application of either party. Const. art. V, sec. 17. This applies to an appeal from a final order in the administration of the estate of a deceased person. The statute also provides:

"In all matters of probate jurisdiction, appeals shall be allowed from any final order, judgment, or decree of the county court to the district court by any person against whom any such order, judgment or decree may be made or who may be affected thereby." Comp. St. 1922, sec. 1471.

Neither the Constitution nor the statute quoted contains an exception requiring a review by proceedings in error as distinguished from appeal. Permission to file the claim out of time is an essential step in the proceeding to allow it as a charge against the estate. If the county court was without authority to permit the filing of the claim because it was barred by a former order, the administratrix had a right to have the permission reviewed. The granting of permission to file the claim of Spittler Brothers after the expiration of the time-limit was not an appealable order. While a peremptory denial of such permission is a final order and appealable, permission to file a belated claim is an

interlocutory order that may be reviewed on appeal from the judgment allowing the claim as a charge against the estate of decedent.

Upon appeal from a final order of the county court the controversy is triable *de novo* in the district court and this rule applies to final orders in the administration of the estates of deceased persons. *In re Estate of Normand,* 88 Neb. 767. In harmony with this principle it has been held:

"Upon appeal from the allowance by the county court of a claim against the estate of a deceased person, the district court tries the case *de novo,* and must determine whether the claim was filed in time in the county court." *In re Estate of Gamble,* 91 Neb. 199.

In following these rulings in the present case the district court did not err.

Did the county judge err in permitting the claim to be filed? On the showing made did he have any discretion in the matter? Did the district court on appeal err in finding that the claim was outlawed by the order barring unfiled claims pursuant to the statute of nonclaim? After letters of administration were issued it was the duty of the county or probate court to receive, examine, adjust and allow all lawful claims against the estate of decedent and to give notice of the date for the hearing of claims and of the time for presenting them. Comp. St. 1922, sec. 1336. The statutory time which the county court is required to allow for the filing of claims must not exceed 18 months nor be less than three months. Comp. St. 1922, sec. 1338. In the respects outlined there was a strict compliance with the statutes. Claims not filed within the time limited by the county court, after due notice, are forever barred. Comp. St. 1922, sec. 1344; *Burling v. Allvord,* 77 Neb. 861; *In re Estate of Hoferer,* 116 Neb. 254. Time and notice given by the county court were in strict compliance with the statutes. The statute of nonclaim as a bar is more rigorously applied than the general statute of limitations. 2 Woerner, Administration (2d ed.) sec. 402; *Winter v. Winter,* 101 Wis. 494. In Nebraska an administrator cannot waive the defense of nonclaim to the prejudice of the estate. *Estate of Fitzgerald v. First Nat. Bank of Chariton,* 64 Neb. 260.

There is, however, a statutory provision that permits the filing of a belated claim within three months from expiration of the general time-limit. "The court may," says the statute, "for good cause shown allow further time not exceeding three months." Comp. St. 1922, sec. 1340. The sufficiency of the showing by claimants is the controlling question. The jurisdiction of the county judge to permit the filing of a belated claim depends upon good cause shown. In absence of such a showing he has no discretion to grant such permission. *In re Estate of Hoferer,* 116 Neb. 254. The showing of good cause should be analogous to that required by a court of equity in granting a new trial in an ordinary case. *Nebraska Wesleyan University v. Bowen,* 73 Neb. 598. In the present instance there was no evidence of fraud, accident, mistake, unavoidable misfortune, excusable neglect or diligence. The substance of the showing made is that the claim is just and valid and should be paid; that it was a valid claim for merchandise when Golden died; that his estate is solvent; that the period fixed by the county court for filing claims was only three months, whereas it could legally have been 18 months; that within the time limited claimants did not know that proceedings to settle the estate were pending; that they had no knowledge of the published notice or of the order barring claims; that after learning the facts they promptly applied for permission to file their claim. This did not amount to "good cause shown." The diligence that usually prompts merchants to collect money due them on accounts for merchandise was lacking. In addition, claimants knew of Golden's death a day or two after it occurred. Notice of a public sale by the administratrix of property belonging to the estate was posted in claimant's store before the time-limit expired. Before the time for filing claims expired, administratrix negotiated with claimants for electric batteries and as a result they repaired a lighting plant on a farm belonging to the estate and the bill therefor was paid by her check as administratrix. The evidence shows conclusively that claimants were chargeable with constructive notice authorized by statute and given. Their transactions

with the administratrix necessarily implied previous proceedings to administer the estate. A sufficient excuse for the delay was not shown. A new trial in an ordinary case should not be granted on the showing made by claimants. The claim against the solvent estate makes a strong appeal to morality, equity and justice, but the arbitrary bar of the nonclaim statute and the peremptory order of the county court pursuant thereto apply alike to just and unjust claims. *Doyle v. Jennings,* 229 N. W. (Ia.) 853. The order permitting the claim in controversy to be filed was unauthorized and the district court properly set it aside.

AFFIRMED.

IN RE ESTATE OF THOMAS V. GOLDEN.
TRAVELERS INSURANCE COMPANY, APPELLANT, V. MARTINA G. DISHNER, ADMINISTRATRIX, APPELLEE.

FILED JULY 17, 1930. No. 27400.

Executors and Administrators: ADMINISTRATION OF ESTATES: BELATED CLAIMS. Good cause for granting permission to file a belated contingent claim against the estate of a deceased person is analogous to that required by a court of equity in granting a new trial in an ordinary case, and the evidence in the present instance *held* insufficient for that purpose.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

J. D. Cronin and *J. A. Donohoe,* for appellant.

M. F. Harrington, Lewis Chapman and *W. J. Hammond, contra.*

Seymour S. Sidner, C. M. Skiles and *Perry, Van Pelt & Marti, amici curiæ.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

ROSE, J.

This is a controversy between the Travelers Insurance Company, claimant, and Martina G. Dishner, administra-

trix of the estate of Thomas V. Golden, deceased, over a contingent claim based on a plea for a deficiency judgment against the Golden estate in a pending action to foreclose a real estate mortgage executed by Golden in his lifetime to secure a note for $5,000. The time limited by the county court for the filing and barring of claims expired before the contingent claim was presented. On application of claimant the county court allowed the claim to be filed as a belated one, over objections of the administratrix. Later the claim was allowed as a contingent claim against the estate. Upon appeal to the district court it was held that the claim was barred by the order of the county court pursuant to the nonclaim statute. From the judgment of the district court claimant appealed to the supreme court.

An examination of the record results in a finding that good cause for permission to file the claim in the county court out of time was not shown for reasons stated in the opinion in the case of *In re Estate of Golden, ante,* p. 226, decided herewith.

AFFIRMED.

The following opinion on motion for rehearing was filed January 2, 1931. *Former opinion adhered to, except as to character of claim.*

1. **Executors and Administrators:** CONTINGENT CLAIMS. A contingent claim against a decedent's estate is one upon which the liability depends upon some future event, which may or may not happen, and which makes it uncertain whether it will ever be a liability.
2. ———: ———. The fact that a note has been secured by a mortgage and the payee has elected to enforce his remedy to foreclose, and a deficiency judgment may be obtained, does not render the claim contingent. It is an absolute claim against decedent's estate.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

DAY, J.

This controversy arose over the filing of a claim by the

Travelers Insurance Company against the estate of Thomas V. Golden, deceased, after the expiration of the time fixed by the court under the provisions of the nonclaim statute. It is now before the court on motion for rehearing. For the former opinion, see *ante*, p. 232. The facts stated therein are substantially correct and are not repeated here. We referred to the claim in that opinion as "contingent," but, upon further consideration, we conclude that such reference to the claim herein involved was erroneous.

This case has been reargued orally by the attorneys for the parties as well as several friends of the court, all of whom have filed exhaustive briefs upon the questions involved. It has been generally assumed by them that the claim here presented was a contingent one. If, however, the claim is absolute, it was barred by the nonclaim statute; the opinion in *In re Estate of Golden, ante*, p. 232, is controlling; the law stated in the syllabus in our former opinion is sound and the conclusion we then reached is correct. If, on the other hand, it is a contingent claim, the question as to whether the amendment of 1901 (Laws 1901, ch. 28) to the nonclaim statute, which as then amended is now known as section 1344, Comp. St. 1922, operates as a repeal by implication of the section now known as section 1362, Comp. St. 1922, is one which might well engage our attention.

When Golden executed his note for $5,000, he created an obligation which was absolute, fixed and determined. He owed an obligation which was definite. The happening of no subsequent event was necessary to create the obligation to pay. The failure of any event to happen would not relieve him from payment. Unlike a stockholder's liability that only accrues when and if the corporation becomes insolvent; unlike the obligation upon a bond, liability upon which does not accrue until default, the obligation of the maker of a note is fixed, definite, and certain. The confusion in this case may be accounted for because of the payee's selection of remedies. It chose to proceed to enforce its claim against the security. It could not have been forced to so proceed. *Carson's Executors v. Buckstaff*, 57

Neb. 262. A contingent claim against a decedent's estate is one upon which the liability depends upon some future event, which may or may not happen, and which makes it uncertain whether it will ever be a liability. *Stichter v. Cox*, 52 Neb. 532; *Hazlett v. Estate of Blakely*, 70 Neb. 613; *Davis v. Davis*, 137 Wis. 640; 11 R. C. L. 205, sec. 229.

In *Stichter v. Cox, supra*, we held: "When a grantee of real estate, as part of the consideration for the purchase, assumes and agrees in the deed to pay a certain mortgage on the premises, he is liable for the mortgage debt, and the grantor, immediately upon the maturity of the mortgage, may recover from the grantee the amount due thereon, though the grantor may have paid no part of it." In *Carson's Executors v. Buckstaff, supra*, the court held: "A creditor cannot be compelled to exhaust the collateral security held by him as a condition precedent to his right to sue his debtor upon his note." A note is an absolute obligation to pay, and the fact that it has been secured by a mortgage, and the payee has elected to enforce his remedy by foreclosure, and a deficiency judgment may be obtained, does not render the claim contingent. It is an absolute claim against decedent's estate.

The former opinion of the court is adhered to, except as to the reference to the claim herein involved as contingent in the statement, which claim we now hold to be absolute, under the statute.

AFFIRMED.

IN RE ESTATE OF CHARLES STRELOW.
FRANK C. SCHULTZ ET AL., APPELLANTS, V. ANNA BACHELOR ET AL., APPELLEES.

FILED JULY 17, 1930. No. 27197.

1. Wills: TESTAMENTARY CAPACITY: QUESTION FOR JURY. Where the evidence of physicians and others as to the mental capacity of a testator to execute a will is in conflict, such evidence is for the jury as sole judges of the credibility of the witnesses, and the verdict will not be disturbed unless it is clearly wrong.
2. ———: UNDUE INFLUENCE. The presumption of undue influ-

ence does not arise from the mere fact that the beneficiaries are not related to the testator; but where such beneficiaries were present and had an opportunity to dictate the disposition of the property when the testator was ill and unable to comprehend the full extent of the proceedings, a will may be declared invalid as the result of such undue influence.

3. Trial: REQUEST FOR INSTRUCTION. "If either party desires an instruction which would serve only to guide the jury in weighing certain features of the evidence in connection with the issues, he must request such specific instruction. The proper time to make the request is when the evidence is concluded, and the proper manner of making it is by submitting in writing the instruction desired." *Osborne v. State*, 115 Neb. 65.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

P. James Cosgrave, Wilmer B. Comstock and *John H. Comstock*, for appellants.

Meier & Meier, Hall, Cline & Williams and *Henry J. Beal*, *contra.*

A. M. Morrissey, amicus curiæ.

Heard before GOSS, C. J., DEAN, GOOD, EBERLY and DAY, JJ.

DEAN, J.

Frank C. Schultz, Albert Schultz, and Henry Schultz, as proponents, and claiming to be the beneficiaries of the will of Charles Strelow, deceased, filed their petition in the district court for Lancaster county to have an instrument, dated December 30, 1925, purporting to be the last will and testament of the above named Charles Strelow, admitted to probate. Shortly thereafter objections to the probate of the will were filed by the following contestants, being nieces and nephews of Strelow, namely: Anna Bachelor, Michael Baltzer, Hattie Baltzer, Nellie Baltzer Jameson, heirs of Minnie Baltzer, deceased, Louise Feekin, Mary Roop, Bertha Rowland, Robert Strelow, and Fred Strelow. The contestants allege that Charles Strelow did not have the mental capacity to execute the will in suit on the date above mentioned, and that he was induced to execute the

will by reason of undue influence exercised by the proponents and to affix his signature thereto. The action was tried to a jury and, upon submission of the evidence, a verdict was returned in favor of the contestants and against the proponents. Thereupon the court adjudged and decreed that, "in accordance with the verdict of the jury herein, the will of December 30th, 1925, is not the last will and testament of Charles Strelow, and that the proponents, Frank C. Schultz, Albert L. Schultz and Henry F. A. Schultz pay the costs of this action." The proponents have appealed.

The salient facts in the present case were concisely stated in an opinion on a former appeal entitled *In re Estate of Strelow*, 117 Neb. 168. A brief part of the recital, in our former opinion, in respect of certain of the material facts, is here reproduced:

"Charles Strelow and Theodore Strelow were bachelor brothers who became individually owners in fee of certain adjoining lands in Lancaster county, which they respectively farmed and received the usufruct thereof. They were hard-workers, and frugal. They lived and strove for each other. On July 13, 1909, each executed his last will and testament, in due and legal form, by means of which the one became the sole legatee of the other. The will of Charles, so far as material for our consideration, is as follows:

" 'First, I give, devise and bequeath to my brother, Theodore Strelow, all the property, real and personal, * * * which I may own or possess * * * at my death. Second, I hereby appoint my brother, the said Theodore Strelow, the executor of this my last will and testament, and request that no bond be required of him as executor.'

"Theodore's will was the same as that of Charles, except the names of the testator and legatee were reversed. These wills were then by them deposited with the county judge of such county for safe-keeping. Theodore died on November 5, 1925, never having been married, his father, mother, brothers and sisters having each and all preceded him in death, save his brother Charles. On November 27, 1925,

one Robert R. Hastings was appointed guardian of the person of Charles Strelow, and the First Trust Company, a corporation of Lincoln, was appointed guardian of his property (as said in the briefs, owing to his extreme old age—80 or 81 years). On December 30, 1925, Charles Strelow executed, in due and legal form, the will in controversy herein, which, so far as material, provides in substance as follows: The first paragraph contains the usual direction authorizing the executor to pay the funeral expenses, debts, etc., out of his personal property. The second devises to the children of his sister Rike the sum of $5,000, to be divided share and share alike. In the third he states that he has not forgotten, nor been unmindful of, other children of certain of his brothers and sisters, but that it is his will and intention that they do not take or have any of his estate. The fourth is as follows:

" 'I give, devise and bequeath to Albert L. Schultz, Henry F. A. Schultz and Frank C. Schultz, the sons of my old friend and neighbor Albert Schultz, the rest, remainder and residue of my property, both real and personal of every kind and nature wherever situated possessed by me at my death share and share alike.'

"In the fifth he appoints the last above named legatees (appellants herein) as his executors, and revokes all former wills by him made. On January 21, 1926, Charles died, never having been married, the death of his father, mother, and all brothers and sisters having preceded his demise."

The question presented by the record is whether, at the time the will was executed, Charles Strelow was possessed of sound mind and memory and understood the contents of the instrument, or whether such will was the result of undue influence exercised by proponents upon him while he was ill and unable to comprehend the extent of his estate, approximating $70,000, or about that sum.

A physician, who was present when the will was signed, testified that the testator was then ill and under treatment in a hospital and that he appeared to be confused and timid and depressed. In speaking of the will, this witness said to Strelow, "You signed your will in my pres-

ence for them a few days ago," to which Strelow replied, "I don't know, I don't understand it." The physician testified that he, as a medical adviser, was not convinced that Strelow knew he was making a will. Another testified that he examined Strelow on the day the will was executed, and that he was in a "low, muttering delirium" and was being held in bed by one of the sisters at the hospital, and that, in his opinion, he was not then "mentally competent to do anything," but that he was of unsound mind. Another physician testified that he treated one of Strelow's feet for a granular affection and that he was about "the most unkempt person" he had ever seen, very unclean, decrepit and "undergoing senile changes," and that there was a condition of hardening of the arteries.

Dr. F. A. Graham, called as a witness by the contestants, testified that he found a condition of arteriosclerosis in Strelow and that the mind of a person so afflicted is "unable to transact business or to think or to act rationally. It slows them down in every way. They become more or less careless and indifferent, lack of attention to their person, to their clothing, lack of attention to everything around them;" that Strelow was "extremely dirty, clothes dirty, hair dirty, most untidy and most unkempt," the first time he saw him. This physician also testified that, about a week after Strelow signed the will, he was called to see him, and he then asked Strelow if he understood what was in the papers he had signed, and that Strelow replied he did not. In this physician's opinion, Strelow was not of sound mind at the time in question. And a nurse who was in attendance on Strelow, several weeks after the will was executed, testified that he was in a semiconscious condition all of the time that she was on the case and that, by the doctor's orders, no one was permitted to see him except his attorney who was there at least twice a day, and that he, the attorney, once asked the nurse to leave the room.

The evidence of a physician called on the part of the respondents was that he found Strelow "was slowed down a little bit mentally. He got excited easily, and physically

he showed considerable sclerosis, but mentally he was perfectly sane." Several other physicians testified on the part of the respondents that, while Strelow was a very sick man, he appeared to be rational and to know what he was doing.

A niece of the decedent testified that the Strelow brothers and her family had always been on friendly if not intimate terms, but that in later years she had not visited them. She also testified that Charles did not think that it was necessary to hold exercises or to procure a minister for the funeral of his brother Theodore. And in this she is corroborated by the minister who officiated at the funeral and also by the undertaker in charge of the services.

From the evidence of the proponents it appears that they had been acquainted with the decedent for many years; that it was at their suggestion that the attorney who drew up the will was employed, and that they were frequent visitors at the hospital during the time Strelow was ill. On rebuttal, the evidence of a number of witnesses, who were neighbors of the Strelows or who were casually acquainted with them, was offered tending to prove that Charles was of sound mind.

Where the evidence of physicians and others as to the mental capacity of a testator to execute a will is in conflict, such evidence is for the jury as sole judges of the credibility of the witnesses, and the verdict will not be disturbed unless it is clearly wrong. The presumption of undue influence does not arise from the mere fact that the beneficiaries are not related to the testator; but where such beneficiaries were present and had an opportunity to dictate the disposition of the property when the testator was ill and unable to comprehend the full extent of the proceedings, a will may be declared invalid as the result of such undue influence. "Where the issues raised are fraud and undue influence, any evidence, however slight, tending to prove those issues, is freely admitted and circumstantial evidence may suffice as a whole to disprove the will." 1 Schouler, Wills (6th ed.) 368, sec. 298. In the case entitled *In re Estate of Lyell,* 116 Neb. 827, we said:

"In a will contest, where want of testamentary capacity is one of the objections to the probate of a proposed will, the terms of the will, if it be unnatural, unjust, inequitable, or unreasonable, may be considered by the jury, in connection with all the other evidence, in determining whether the decedent possessed testamentary capacity."

And in *In re Estate of Kubat,* 109 Neb. 671, we said:

"In an action contesting the validity of a will for want of mental capacity in the testator, and undue influence exerted upon him, if the evidence on these issues is conflicting, they should be submitted to the jury for determination."

Proponents contend that the verdict was the result of passion and prejudice. But we do not think the objection is well founded, and this, in part, from the fact that the chronology of the case discloses that it has been tried to two juries. At the close of the first trial the proponents brought the record here on appeal, and the case was remanded for a new trial on account of errors occurring during the trial. But, at the close of the second trial, the result was the same, the jury having again found in favor of the contestants and against the proponents.

The proponents now complain of the court's refusal to give an additional instruction requested by them. But this instruction was requested too late for careful consideration by the court, and after all other instructions had been prepared. We have held: "If either party desires an instruction which would serve only to guide the jury in weighing certain features of the evidence in connection with the issues, he must request such specific instruction. The proper time to make the request is when the evidence is concluded, and the proper manner of making it is by submitting in writing the instruction desired." *Osborne v. State,* 115 Neb. 65.

We have carefully examined the instructions given by the court of its own motion and also those requested by the proponents. We find no error in those given by the court nor in the denial of those refused. In fact, the jury

appear to have been properly instructed on every material feature disclosed by the record.

The judgment of the trial court is right and is in all things

AFFIRMED.

The following opinion on motion for rehearing was filed January 2, 1931. *Former judgment of affirmance adhered to; second paragraph of opinion vacated.*

1. Wills: UNDUE INFLUENCE: QUESTION FOR JURY. In a will contest, where undue influence is alleged, that question should be submitted to the jury when the facts and circumstances proved, together with inferences fairly deducible therefrom, are such that reasonable minds might conclude that the will was not the free and voluntary act of testator, but the result of undue influence exercised upon him.
2. Paragraph 2 of the syllabus of the former opinion, *ante*, p. 235, is vacated.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

GOOD, J.

While pending on motion for rehearing, this cause has been reargued on its merits and resubmitted for further consideration. For a full statement of the issues and relevant facts, the reader is referred to the former opinion, *ante*, p. 235.

The entire record has been carefully reexamined. We are satisfied with our former holding, concerning the evidence with respect to the mental capacity of testator, and that that question was properly submitted to the jury. The only questions requiring further consideration are the correctness of the rule announced in the second paragraph of the syllabus of our former opinion, and whether the court erred in submitting to the jury the question of undue influence. If, from the facts and circumstances proved and the inferences properly deducible therefrom, reasonable minds might differ as to whether undue influence had been exercised upon testator and produced or caused the

execution of the will, then the question of undue influence is for the jury's determination. *In re Estate of Noren*, 119 Neb. 653.

The facts that testator makes a will, giving the major part of his estate to strangers to his blood, and that the beneficiaries under his will had opportunity to exercise undue influence in procuring the making of the will, will not, alone, justify an inference that such undue influence was exercised. But, where the testator is aged, infirm, suffering from arteriosclerosis in an advanced stage, confined in a hospital suffering from pneumonia, at times delirious, and at other times in a semicomatose condition, and where there is evidence tending to show that he reposed great confidence and trust in the beneficiaries of his will; that he accepted their advice on other occasions and deferred to their wishes; and that the beneficiaries had taken the testator from the immediate presence of his relatives under circumstances from which it might be inferred that they did not desire him to talk to and be with such relatives; and where there is evidence also tending to show that the beneficiaries visited him very frequently in the hospital and were with him most of the day on which the will was executed; that the attorney who drew the will had been the attorney of the beneficiaries; that the beneficiaries and their attorney had conferred together about the will and the making thereof; that the attorney drafting the will had procured, without suggestion from the testator, so far as the record discloses, alienists to visit the testator on various occasions prior to, at the time of, and subsequent to, the making of the will; that large fees were paid to or demanded by such alienists; that, by the will, more than 90 per cent. of the estate of testator was given to strangers to his blood, while certain of his relatives were entirely disinherited; where the attorney usually employed by testator was accessible, but was not called to draft the will, there is sufficient to excite more than mere suspicion that the will was procured under undue influence, especially where there is evidence tending to show that testator, at the time of making the will, was in-

capable of comprehending what he was doing. These facts, together with other facts disclosed by the record, we think were sufficient to warrant the jury, if they believed the evidence produced by contestants, in finding that undue influence had been exercised. It must be borne in mind, too, that, under the peculiar circumstances, the failure of the beneficiaries, who were present in court, to take the stand and testify, and the failure to call the attorney, who drafted the will, to testify and submit to cross-examination, is significant.

We feel constrained to hold that the court did not err in submitting to the jury the question of undue influence.

The rule announced in the second paragraph of the syllabus of our former opinion has been attacked as in conflict with the rules heretofore announced by this court. We are of the opinion that the statement of law therein contained is too sweeping.

In *In re Estate of Bayer*, 119 Neb. 191, it was held: "Where a will is contested because it is alleged that it was procured by undue influence, the burden is upon the contestants to establish by proof, or by fair inference to be drawn from facts proved, that there was undue influence, which induced the testator to dispose of his property contrary to his intention. In such a case, suspicion or supposition of undue influence is not sufficient either to require the submission of the question to the jury, or to sustain a verdict."

In the case of *In re Estate of Noren, supra,* it was said (p. 659): "Undue influence as condemned by the law in this class of cases is a subtle thing. Much like crime, it is usually surrounded by all possible secrecy. It is almost always difficult to prove by direct and positive proof. It is largely a matter of inferences from facts and circumstances surrounding the testator, his life, character, and mental condition, as shown by the evidence, and the opportunity afforded designing persons for the exercise of improper control."

The correct rule, we believe, is this: In a will contest, it is necessary to submit the question of undue influence

to the jury when the facts and circumstances proved, together with inferences fairly deducible therefrom, are such that reasonable minds might conclude that the will was not the free and voluntary act of the testator, but the result of undue influence exercised upon him.

The second paragraph of the syllabus of our former opinion is vacated. No prejudicial error has been found. We adhere to our former judgment of affirmance.

AFFIRMED; SECOND PARAGRAPH OF FORMER OPINION VACATED.

DAWSON COUNTY IRRIGATION COMPANY, APPELLANT, V. ADAM MCMULLEN ET AL., APPELLEES.

FILED JULY 17, 1930. No. 27264.

1. **Constitutional Law.** Section 8428, Comp. St. 1922, does not violate section 1, art. V of the Constitution.
2. ———: WATERS: STATUTE: VALIDITY. A statute conferring quasi-judicial powers on an administrative board is not violative of the "due process" provisions of either the federal or state Constitution, where the statute also provides for due notice of any hearing and for an appeal to the courts by any person aggrieved by an order made by such board in the exercise of its quasi-judicial functions.
3. **Injunction:** ADMINISTRATIVE BOARDS. An administrative board, possessing quasi-judicial functions, will not be enjoined from conducting a hearing authorized by statute, simply because it may make an erroneous order in the premises, where the statute also authorizes an appeal to the courts and where the order may be reviewed and any error corrected.
4. **Statutes:** CONSTRUCTION. Ordinarily, courts will refuse to construe statutes where such construction is not necessarily involved in the cause before them.

APPEAL from the district court for Dawson county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

W. M. Cook and *Beeler, Crosby & Baskins,* for appellant.

C. A. Sorensen, Attorney General, Beatty & Halligan and *T. F. Neighbors, contra.*

W. V. Hoagland, amicus curiæ.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

GOOD, J.

This is an action to enjoin the state officials comprising the department of public works from conducting a hearing, pursuant to the provisions of section 8428, Comp. St. 1922, for the purpose of determining whether plaintiff's water appropriations for irrigation purposes should be declared forfeited and annulled because of abandonment or nonuse. To the amended petition general demurrers were sustained. Plaintiff elected to plead no further. Judgment of dismissal was entered, from which plaintiff appeals.

Plaintiff bases its right to injunctive relief on the ground that said section 8428, as construed by defendants, is unconstitutional, and that defendants, therefore, have no right or power to conduct hearings pursuant to its provisions.

Section 8428, Comp. St. 1922, *inter alia,* provides: "All appropriations for water must be for some beneficial or useful purpose, and when the appropriator or his successor in interest ceases to use it for such purpose the right ceases. The department of public works shall, as often as necessary, examine into the condition of every water appropriation, * * * and shall compile information concerning the condition of every water appropriation, * * * and if it shall appear that any water appropriation has not been used for some beneficial or useful purpose, or having been so used at one time has ceased to be used for such purpose, for more than three years, the department of public works shall appoint a place and time of hearing and shall serve notice upon the owners of such water appropriation * * * to show cause by such time and at such place, why the water appropriation owned by such person should not be declared forfeited and annulled, and shall also serve such notice upon the landowners under such water appropriation, ditch or canal. Such notice shall contain the date and place of hearing, a description of

the water appropriation, the number thereof upon the books and records of the department of public works, the date of priority, the point of diversion and a description of the lands which are located under such water appropriation, and shall call upon all persons interested in said water appropriation to show cause why the same shall not be canceled or annulled. Such notice shall be served personally at least thirty days before said date of hearing upon those owning or controlling the water appropriation and the ditch, canal or reservoir for the purpose of using or storing water for any purpose whatsoever, * * * and a copy of such notice shall further be personally served or sent by registered mail to all persons appearing from the records of the county clerk or register of deeds to be landowners under such appropriation. At such hearing the verified report of the district superintendent shall be *prima facie* evidence for the forfeiture and annulment of such water appropriation. If no one appears at said hearing, such water appropriation shall be declared forfeited and annulled. If some one interested appears and contests the same, the department of public works shall hear evidence, and if it appears that such water has not been put to a beneficial use, or has ceased to be used for such purpose for more than three years, the same shall be declared canceled and annulled. An appeal may be taken from the decision of the department of public works upon said hearing to the district court of the county in which the point of diversions of such water appropriation is situated."

The section of the statute quoted is attacked on several grounds. It is charged, in effect, that the statute is unconstitutional because it purports to give to the department of public works judicial powers, in violation of section 1, art. V of the Constitution, which vests judicial powers in the tribunals therein named. That section of the Constitution also gives to the legislature the power to create other courts inferior in jurisdiction to the supreme court. However, this court has held that the section in question does not create a court, but that it creates an administrative body, with quasi-judicial powers.

In *Crawford Co. v. Hathaway*, 67 Neb. 325, it was said (p. 367): "Such functions, it would seem, are clearly administrative in character, and not judicial. It is a judicial function to administer justice between litigants in cases where disputes arise and to settle these disputes according to law as administered in courts of justice. The board of irrigation (to which the department of public works is a successor), however, in many cases acts in advance of any dispute, and whether there is or will be a controversy in no way affects its powers. The courts can act only as controversies arise between litigants, and then only by determining the questions presented by the litigation. While there are some questions affecting property rights which grow out of the administration of the law by the state board of irrigation, and in which are involved matters in dispute calling for action of a quasi-judicial character, yet as to all these ample provisions are made for recourse to the courts. Powers of the same general nature and character are conferred upon almost every administrative body known to the statute, and regarding which it has frequently been decided are of a quasi-judicial nature, and yet such bodies are invariably held to be administrative, and to in no way conflict with the constitutional provisions regarding officers and bodies upon whom judicial power may be conferred. The state board of transportation, as heretofore organized in this state, the constitutionality of which has been invariably upheld when attacked, in all respects, save as to the manner of passing the law providing for its creation, is a fair illustration of the validity of legislation of this character. Numerous other boards and offices created by statutes, of an administrative character, and yet possessing powers of a quasi-judicial nature, might also be referred to if thought to serve any useful purpose. For the reasons given, we are of the opinion that the sections of the act in question are not obnoxious to the Constitution on the objections raised by counsel, and that the authority of the board of irrigation to make the determinations contemplated by the act, and the requirement of its approval as a condition to the

right of appropriation under the provisions of the act is a valid exercise of legislative power."

In *Farmers Canal Co. v. Frank,* 72 Neb. 136, a case involving a hearing before the state board of irrigation, it was held: "The powers of the state board of irrigation exercised under section 16, art. II, ch. 93a of the irrigation act of 1895, are quasi-judicial in their nature."

In *Enterprise Irrigation District v. Tri-State Land Co.,* 92 Neb. 121, it was held: "The constitutionality of the irrigation act of 1895 and of the provisions thereof creating the state board of irrigation and conferring on the board the right to determine priorities, reaffirmed"—following *Crawford Co. v. Hathaway,* 67 Neb. 325.

In *Kersenbrock v. Boyes,* 95 Neb. 407, it was held: "The state board of irrigation is a tribunal, quasi-judicial in its nature, with authority to perform statutory duties in administering public waters, and is not disqualified to hear a controversy between the state and an appropriator whose right is contested by the state." That was a case where rival applicants had asserted the right to use of the same public water at the same site. The state board of irrigation directed plaintiff to appear and show cause why his application should not be canceled. Upon a trial of the issues the state board canceled the plaintiff's application. On appeal to the district court the findings and order of the board were upheld, and its judgment was affirmed in this court.

State v. Delaware-Hickman Ditch Co., 114 Neb. 806, involved a proceeding under section 8428, Comp. St. 1922, whereby the state, as here, sought to cancel a water appropriation for irrigation purposes on the alleged ground of nonuser. A hearing was had. The finding of the board was adverse to the state, and such finding was affirmed both in the district and supreme courts.

In *In re Application of Babson,* 105 Neb. 317, it was held: "The department of public works is an administrative body, having quasi-judicial functions, and is invested with reasonable discretion in the exercise of its supervisory powers."

In *State v. Oliver Bros.*, 119 Neb. 302, it was held: "The department of public works is an administrative body, having quasi-judicial functions, and is invested with reasonable discretion in the exercise of its supervisory powers."

"In proceeding under section 8428, Comp. St. 1922, before department of public works to have defendants' water rights canceled on ground that water had not been used by defendants for more than three years immediately last past, plaintiff's appeal from adverse determination of board was properly taken to district court, as against contention that appeal should have been taken directly to supreme court." (228 N. W. 864)

By a long line of decisions this court is firmly committed to the proposition that, under said section 8428, the state board of irrigation and its successor, the department of public works, is an administrative body, possessing quasi-judicial powers, and that the section is not in violation of section 1, art. V of the Constitution.

It is further urged that the section is unconstitutional because the right of appeal from the decision of the department of public works in a proceeding of this character is so uncertain that it amounts to a denial of the right to be heard in the court of last resort. Counsel for plaintiff now concede that this question has been settled adversely to this contention in the case of *State v. Oliver Bros., supra,* and no longer insist upon that proposition.

It is insisted that the statute is unconstitutional because it authorizes and permits the taking of private property without due process of law. The statute affords opportunity for any one, who may be aggrieved by any finding or order in the premises entered by the department of public works, to appeal to the district court and from that court to the supreme court. One cannot be said to be deprived of his property without due process of law so long as he has recourse to the courts for the protection of his rights. The statute affords ample opportunity to plaintiff in this case, if aggrieved by any action of the department of public works, to seek redress from its decision to the courts. See *Moise v. Powell,* 40 Neb. 671. In *Reed v.*

Reed, 70 Neb. 779, it was said (p. 785): "Due process of law may be said to be satisfied whenever an opportunity is offered to invoke the equal protection of the law by judicial proceedings appropriate for the purpose and adequate to secure the end and object sought to be attained." See, also, *Chicago, B. & Q. R. Co. v. Headrick*, 49 Neb. 286.

Plaintiff further contends that, if the statute in question authorizes any action by the department of public works, it is to cancel or annul the entire appropriation; that the department is not vested with power to cancel or annul the appropriation in part, and that it is about to proceed to, and will, unless enjoined, enter an order beyond the power conferred by said section. This contention is wholly without merit. It cannot be determined in advance what order or ruling may be made by the department in the exercise of its quasi-judicial functions, but, if any erroneous order is made, redress may be had by an appeal to the courts. Under the circumstances, plaintiff was not entitled to injunctive relief. The department was authorized to conduct a hearing. It will not be presumed in advance of such hearing that it will attempt to go beyond the powers conferred. Should it do so, redress may be had by an appeal from its decision.

Plaintiff urges and insists that a construction of section 8428, Comp. St. 1922, is imperative, to determine whether or not the department of public works is vested with the power to cancel and annul the water appropriation in part, or whether it is limited to the right to cancel and annul the appropriation *in toto* for nonuse or because of abandonment. That question is not properly before us at this time.

The only proposition presented here is whether or not plaintiff is entitled to enjoin a hearing by the department of public works. Had plaintiff submitted to a hearing before the department, a ruling made by it, and an appeal taken therefrom and brought to this court in that manner, the proper construction of the statute might have been involved, and, if so, would have been passed upon. The construction of the statute in that respect is not in-

volved in this appeal. To undertake to pass upon it would amount to dictum, and would not be binding in a subsequent case where the question was properly involved.

We find no error in the record. The judgment of the district court is

AFFIRMED.

CITIZENS NATIONAL BANK OF WISNER, APPELLEE, V. MICHAEL MCNAMARA ET AL., APPELLEES: DANIEL H. MCNAMARA, EXECUTOR, APPELLANT.

FILED JULY 17, 1930. No. 27254.

1. **Interpleader.** Where one, owing a debt which is claimed by two or more persons, lodges in the district court an application in due form, making the respective claimants of the debt parties to the proceeding, and at the same time brings into court money in an amount equalling such debt and interest, and prays for a determination of the true ownership of the fund and that such applicant be released, and where the respective claimants join issue thereon, such proceeding is one coming within the provisions of sections 8549-8552, Comp. St. 1922, governing interpleader.
2. **Appeal: INTERPLEADER: TRIAL DE NOVO.** Such suit is one in equity, and when appealed to this court is here for determination *de novo*, as provided in section 9150, Comp. St. 1922.
3. **Record** examined, and judgment of the trial court reversed and cause remanded, with directions to enter decree in harmony with this opinion.

APPEAL from the district court for Cuming county: CHARLES H. STEWART, JUDGE. *Reversed, with directions.*

A. R. Oleson and *W. T. Thompson*, for appellant.

C. C. Flansburg and *Zacek & Nicholson, contra.*

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON and EBERLY, JJ., and THOMSEN, District Judge.

THOMPSON, J.

The Citizens National Bank of Wisner, appellee, hereinafter called the bank, instituted this action to have determined the ownership of two certificates of deposit, one for

$2,700 and the other for $5,000, issued by it to Michael McNamara, making him and his guardian parties to the suit, as well as the appellant individually, and the other appellees. Thereafter such McNamara died and the suit as to him was revived in the name of Daniel H. McNamara, executor of his estate, appellant, hereinafter referred to as executor. Such executor and the St. Joseph Church, hereinafter designated the church, each claimed to be the owner of the above certificates and entitled to the proceeds thereof, and joined issue thereon. The trial court found in favor of the church as to each certificate, together with interest, totaling $9,119.76. The executor appeals.

The issues joined by the executor and the church being as heretofore indicated, this action is one in equity as distinguished from one at law, and is controlled by sections 8549-8552, Comp. St. 1922, governing interpleader. *Shellenberg v. Fremont, E. & M. V. R. Co.*, 45 Neb. 487; *Hartford Life & Annuity Ins. Co. v. Cummings*, 50 Neb. 236; *Farming Corporation v. Bridgeport Bank*, 113 Neb. 323.

Under section 9150, Comp. St. 1922, entitled "Review on Appeals in Equity," it is made our duty "to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions, and upon trial *de novo* of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof."

The bank claims no interest in the certificates other than that of a trust in the fund covered thereby, and brings such fund into court for distribution under its direction to the party entitled thereto. The church claims to be the owner of these certificates by reason of a claimed gift thereof to it by Michael McNamara, as evidenced by the indorsement made on each certificate by him, and denied that the executor is entitled thereto. The executor in his answer and cross-petition alleges that he is entitled to such certificates by reason of his trusteeship, and denies the claim of the

church. The church also insists that McNamara was of sound mind and memory at the time of the claimed transfer to it, and the executor denies this, and alleges that in truth and in fact such McNamara was of unsound mind, and that to the extent of his being incompetent to transact any business at the time of the claimed transfer and long prior thereto, and that in the transaction between McNamara and the church he was overreached by it and those acting for it. Thus, under the record, it becomes our duty to determine as between these contending parties.

The bill of exceptions consists of over 500 pages of typewritten matter. We have acquainted ourselves with its every content, and find: That McNamara was, at the time of the claimed gift of these certificates to the church, a man 84 years of age, and abnormally weak in both body and mind; that he did not intend to make a gift of such certificates to the church as by it alleged, or otherwise; that while it might not have been the intent of those dealing with him, in securing the claimed transfer of the certificates, to overreach him, they certainly did so; that the only intent of McNamara, if any intent he had, was to liquidate the balance of $3,000 owing by him on a previously promised subscription to the church of $5,000, on which he had paid $2,000; that he did not, by the transaction, vest the church with the title and ownership of such certificates, or the proceeds thereof; that in equity and good conscience the proceeds of these certificates belong to his estate. However, as it is evident that he owes the church the $3,000, and as it is quite plain from the record that it was his desire that the same be paid out of the proceeds of such certificates, and as to so pay the $3,000 meets with no objections from the executor, and as this court now has jurisdiction of the parties and the subject-matter, in order that full and complete justice may be here meted out, and this matter, so annoying to every party and person connected therewith, may be judiciously determined, it is considered by us that the judgment of the trial court be set aside, and that decree be entered providing that of the $9,119.76 paid into court the entire taxable costs of the trial court and this court be

first paid out of the same, then $3,000 of what remains be, by the clerk of the district court, paid to the church, and that the remainder thereof be paid to the executor; further, that the two certificates of deposit be, by the bank, marked paid and canceled, and then by such clerk returned to the bank to be made a part of its files. This conclusion is in perfect harmony with the appealing demand, reflected by the record, for the exercise of the chancery powers of this court.

The judgment of the district court is reversed and the cause remanded, with directions to enter decree in harmony with this opinion.

REVERSED.

MARY ZISKOVSKY, APPELLEE, V. LOUIS H. MILLER, APPELLANT.

FILED JULY 17, 1930. No. 27151.

1. **Automobiles**: "GOOD AND SUFFICIENT BRAKES." It is required by section 8395, Comp. St. 1922, that "every motor vehicle while in use on public highways shall be provided with good and sufficient brakes." The term "good and sufficient brakes," as used in the statute, means brakes that, when applied, are adequate to promptly check and slacken the speed of a motor vehicle and bring it to a complete stop.
2. ———: ———: CARE REQUIRED. Due to the extensive use of motor vehicles upon the streets and highways, one who operates such a vehicle thereon is bound to take notice that he may be called upon to make emergency stops, and it is the duty of such person to exercise reasonable care to keep the brakes on his motor vehicle in such condition that such stops are possible.
3. **Appeal**: PERSONAL INJURY: REQUEST FOR PHYSICAL EXAMINATION. A request for a physical examination of an injured party, made during the progress of the trial, is addressed to the sound discretion of the trial court, and a denial of such request is not error, unless, under the circumstances, there appears to have been an abuse of such discretion.
4. **Evidence** examined and *held* sufficient to sustain the verdict of the jury.
5. **Damages**. Under the evidence, the amount of damages awarded plaintiff by the jury *held* not to be excessive.

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Affirmed.*

Crofoot, Fraser, Connolly & Stryker and *James T. English,* for appellant.

O'Sullivan & Southard, contra.

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON and DAY, JJ., and FITZGERALD and HASTINGS, District Judges.

LOVEL S. HASTINGS, District Judge.

This action was brought by Mary Ziskovsky, appellee, to recover damages for personal injuries sustained by her, and to recover damages on a claim that her husband had assigned to her for loss of her services, medical and other expenses incurred on account of her alleged injuries. Both causes of action alleged in her petition arose out of a collision between an automobile owned and driven by the appellant, in which plaintiff was riding as an invited guest, and the automobile of another. The trial resulted in a verdict and judgment for plaintiff in the sum of $2,000, and defendant appeals.

The principal ground urged by defendant for a reversal is that the evidence is not sufficient to support the verdict.

Plaintiff alleged in her petition that the collision complained of was due to negligence on the part of the defendant, in that he failed to have the brakes on his automobile in reasonably good working condition; that he failed to stop his car or turn his car in time to avoid the collision, when, in the exercise of reasonable care and caution, he knew or should have known in ample time of the presence of another automobile.

It is the contention of counsel for defendant that there is no evidence that the brakes on defendant's car were defective, or, if defective, that such condition of the brakes was the proximate cause of the collision, and that defendant could not avoid the collision owing to the sudden appearance of the other car directly in front of him.

Plaintiff's case rests upon her own testimony, that of

her husband, a photograph of the street on which the collision occurred, and a statement of the defendant in a deposition as to the speed that he was driving his car at the time of the accident.

The defendant did not testify, although present at the trial. The only witness called in behalf of the defendant was one of the counsel for the defendant and the insurance company in which defendant carried liability insurance. His testimony was in relation to certain written statements signed by the plaintiff and her husband, made shortly after the accident. The written statements were introduced in evidence by defendant as tending to contradict their testimony given at the trial.

The evidence, without conflict, discloses that on the 24th day of June, 1928, at about 7:30 p. m., while plaintiff and her husband, as the invited guests of the defendant, were riding in an Oldsmobile coupé owned and driven by the defendant, and while said automobile was being driven east along Pacific street in Douglas county, the automobile driven by defendant collided with a Chevrolet coach owned by Celia Stiefler and driven by one Boyer. The Chevrolet coach had entered Pacific street from a private driveway leading from the Highland Country Club and was first seen by the husband of plaintiff when defendant's car was about 50 or 75 feet from it. Plaintiff's husband immediately called the attention of the defendant to the car, and the defendant replied that he saw it. The Chevrolet car was then about in the center of Pacific street and proceeding slowly to the north. They both testify that defendant attempted to apply his brakes, but that the speed of his car did not seem to slacken, and that as the Chevrolet car was turning to the westward in said street and headed in a northwesterly direction defendant's car struck it on the left side and about the middle thereof and shoved it some distance to the east. An excerpt from a deposition given by defendant and introduced in evidence by plaintiff shows that defendant testified therein that at the time of the collision he was driving at about 30 or 35 miles an hour. The plaintiff and her husband in their testimony did not

give an opinion as to the speed of defendant's car at or about the time of the collision, but their written statements introduced by defendant show, at the time that they made such statements, that they estimated the speed of defendant's car at from 25 to 30 miles an hour. A photograph of Pacific street looking east from a point 150 feet west shows that a clear view of that street may be had to the east from said point to where the private driveway from the Highland Country Club intersects the same, and that a car could be seen for some distance south of where said driveway intersects Pacific street, before entering upon said street. Plaintiff and her husband both testify that about five months after the alleged collision defendant told them that he "applied his brakes and they didn't hold. If his brakes had been working that the accident would have never happened."

In the case of *Lewis v. Miller,* 119 Neb. 765, in which the defendant herein was defendant, and which arose out of the same accident as this case,we held, on substantially the same evidence in regard to the condition of the brakes on defendant's car, that the evidence was sufficient to warrant the submission of such act of alleged negligence to the jury. In this case the undenied admission of the defendant, that when he applied his brakes they "didn't hold" and if they "had been working that the accident would have never happened," supported by the fact that when he did apply his brakes the speed of his car was not checked or slackened thereby, was sufficient to warrant the jury in finding that his brakes were defective.

The question then is: Was the defendant guilty of actionable negligence in operating his car with defective brakes? It is required by a statute of this state that "every motor vehicle while in use on public highways shall be provided with good and sufficient brakes." Comp. St. 1922, sec. 8395. The term "good and sufficient brakes," as used in that statute, means brakes that, when applied, are adequate to promptly check and slacken the speed of a motor vehicle and bring it to a stop. With the extensive use of motor vehicles upon the streets and highways,

one who operates a motor vehicle thereon is bound to take notice that he may be called upon to make emergency stops, and it is the duty of such person to use reasonable care to keep the brakes on his motor vehicle in such condition that such stops are possible. The defendant at the time of the collision was operating his car without "good and sufficient brakes" and in violation of the statute, and while this was not negligence *per se,* yet it was a matter for the jury to take into consideration with all the other facts and circumstances in determining whether the defendant was guilty of negligence. The photograph introduced in evidence shows that the Chevrolet coach could have been seen for some distance south of the street before it entered thereon, and if defendant had been keeping a proper lookout he could have seen such car before it entered upon Pacific street at a much greater distance from him than it was when his attention was called to it. The rate of speed that the car of defendant was traveling when 50 or 75 feet distant from the other car would warrant the jury in finding that, had his brakes been in the condition required by the statute, he could have stopped his car in time to have prevented the collision, or so checked and slackened its speed that the injury complained of would not have occurred. The evidence does not bear out the contention of counsel for defendant that the sudden appearance of the Chevrolet car directly in front of the car of the defendant was the sole cause of the accident.

To entitle plaintiff, an invited guest in the car of the defendant, to recover, it was not necessary that the negligence of the defendant be the sole and proximate cause of the damage and injury to her. If the alleged negligence of the defendant concurred with negligence of the driver of the other car so that their combined negligence was the proximate cause of the damage and injury to the plaintiff, then they would be jointly and severally liable to the plaintiff therefor. The concurring negligence of the driver of the other car would not be an excuse or a defense available to the defendant; each is liable; and even though the negligence of the driver of the Chevrolet car contributed

in a greater degree to the injury than that of the defendant, no consideration is to be given thereto. *Koehn v. City of Hastings*, 114 Neb. 106; 45 C. J. 895, sec. 476. The evidence was sufficient to warrant the jury in finding that the defendant was negligent, as alleged, and that such negligence, either alone or concurring with the negligence of the driver of the Chevrolet coach, was the proximate cause of the collision and consequent injury to plaintiff. The verdict is sustained by sufficient evidence.

Error is assigned in the giving of certain instructions. The questions raised as to the giving of such instructions are disposed of in the determination of the question that the verdict is supported by sufficient evidence. Defendant also assigns error in the refusal of the court to give certain instructions requested by him. An examination of the record in relation thereto shows that the requested instructions were fully covered by the charge given by the court.

During the progress of the trial the defendant made an oral application to the court to require plaintiff to submit to a physical examination by a doctor to be selected by defendant. The court refused the request, and such refusal is assigned as error. In the application for such examination no reason is given as to why the application was not made before the commencement of the trial. An examination of the record in regard to the injuries claimed to have been sustained by plaintiff discloses that the permanent injuries to plaintiff were occasioned by scars upon her face that greatly disfigured her, such disfiguration was plainly visible, and an examination, if it had been granted, would in no way have aided the defendant in making his defense.

Application for a physical examination of an injured party should be made before the commencement of the trial of a cause, and if not made until after the trial has commenced a sufficient reason should be assigned why such request was not made before the commencement of the trial. Where such request is made during the progress of the trial, it rests within the sound discretion of the court whether such request be granted, and the ruling of the court there-

on will not be disturbed, unless from all the circumstances an abuse of discretion appears. *O'Brien v. Sullivan,* 107 Neb. 512; *Stuart v. Havens,* 17 Neb. 211; *City of Chadron v. Glover,* 43 Neb. 732. No abuse of discretion appears on the part of the trial court in refusing the request.

Finally, it is insisted that the damages assessed by the jury are excessive and appear to have been given under the influence of passion and prejudice. This contention is without merit. The evidence in relation to the injuries received by plaintiff would support a much larger verdict. Plaintiff at the time of the accident was a married woman 36 years old. As a result of the accident she received several severe cuts upon her face which caused unsightly scars, permanently disfiguring her face. She was severely bruised; her tongue was cut so that it was nearly severed; four of her upper and four of her lower teeth were knocked loose, so that it will be necessary to have them extracted and replaced with artificial. Plaintiff was confined to a hospital for some time under the care of a doctor. That she suffered physical pain on account of her injuries cannot be doubted. She has endured and will in the future endure mental suffering and humiliation on account of her disfiguration. The defendant has no reason to complain of the amount of the verdict.

We have considered all the errors assigned by the defendant and find none prejudicial to him. It would seem from a consideration of the evidence that no other verdict than for the plaintiff could be sustained. The judgment of the trial court should be and is hereby

AFFIRMED.

JOHN DEERK, JR., ET AL., APPELLEES, V. M. L. BABCOCK ET AL.: DEUEL COUNTY STATE BANK, APPELLANT.

FILED JULY 17, 1930. No. 27237.

1. **Bills and Notes: HOLDER IN DUE COURSE: BURDEN OF PROOF.** When it is shown that the title of any person who has negotiated a promissory note was defective, the burden is on the

holder to prove that he or some person under whom he claimed acquired the title in due course. Comp. St. 1922, sec. 4670.

2. ———: DEFECTIVE TITLE. The title of a person who negotiates a promissory note is defective when he obtains the instrument, or any signature thereto, by fraud.

3. ———: ———: NOTICE. An indorsee of a negotiable instrument, the title to which is defective, who takes with knowledge of such facts that his action in taking the instrument amounts to bad faith, will be deemed to have taken with notice of such defective title.

4. ———: HOLDER IN DUE COURSE. "Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him." Comp. St. 1922, sec. 4665.

5. ———: ———: BURDEN OF PROOF. In an action for affirmative relief by the maker of a note against an indorsee, where fraud in the inception of the note is pleaded and supported by proof, the burden is on the indorsee to show that he is a *bona fide* holder. *Held*, that under the evidence the indorsee has not met the burden of proof required in order that it may be adjudged a holder in due course.

APPEAL from the district court for Deuel county: J. LEONARD TEWELL, JUDGE. *Affirmed.*

L. O. Pfeiffer, C. C. Flansburg, L. A. Flansburg and *George A. Lee*, for appellant.

Claude Golding, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY and DAY, JJ., and JAMES and WRIGHT, District Judges.

WRIGHT, District Judge.

John Deerk and his two sons, Albert and John, Jr., brought this action to rescind a contract of purchase of a Colorado school land lease, and to have canceled notes aggregating $6,500, representing a part of the purchase price, and the mortgage given to secure the same. The action was brought against M. L. Babcock, who owned the lease, Thomas A. Smith, who acted as agent for Babcock, J. T. DoRan, who assisted in negotiating the sale, and Deuel County State Bank, which purchased and held the notes

and mortgage in question. Babcock was not brought within the jurisdiction of the court; the defendants Smith and DoRan were dismissed out of the case; and decree was entered against the bank, which claimed to be a holder in due course.

Plaintiffs allege that they were induced, through fraud of Babcock and his agents, to purchase the lease for $7,000, and for which they gave their check for $500, seven notes, six for $1,000 each, and one for $500, secured by a mortgage, and which notes and mortgage the bank purchased and held, with knowledge of the fraud. The prayer of the petition was that the contract be rescinded and the notes and mortgage be canceled. The bank answered, alleging that it purchased the notes and mortgage in due course, without any notice of existing defenses or defects in the title; and that afterwards the plaintiffs willingly executed new notes in substitution thereof. It further alleged that, before it purchased the notes and mortgage, one of its officers, its president, made inquiry of plaintiffs and were by them informed that it would be satisfactory for the bank to purchase the same and it thereupon made such purchase. It alleges that the plaintiffs, having affirmed said notes, were estopped from denying their validity in its hands. Plaintiffs, by reply, denied that the bank was holder in due course, and alleged that it bought with knowledge of the fraudulent representation and fraudulent circumstances under which they were obtained from plaintiffs.

Upon the trial of the issues, the district court found in favor of the plaintiffs, that the bank was not a holder in due course, that it purchased under such conditions as to prevent it from being a holder in due course, and entered a decree canceling the notes and the mortgage securing the same. From this decree the bank has appealed.

The evidence establishes that John Deerk, Sr., and his two sons, herein referred to as plaintiffs, are farmers who have had practically no education and apparently very limited experience outside their particular line of work. M. L. Babcock, who held the school land lease for 640 acres

of land, issued by the state of Colorado, listed the same for sale with Thomas A. Smith, at a price of $3,500. Smith called to assist him J. T. DoRan, a veterinarian, living in the town of Chappell, Nebraska. DoRan brought about an arrangement whereby the Deerks met him, with Babcock and Smith, in Chappell, on November 22, 1928. They went to the land, where plaintiffs made a partial examination of the same. Plaintiffs were then taken to an office in Julesburg, Colorado, where an agreement was reached whereby the Deerks, father and sons, purchased and agreed to pay for this lease the sum of $7,000. As a part of the purchase price, they gave their check for $500, and the balance was represented by seven notes, six for $1,000 each, and one for $500, each due September 1, 1929, with interest at the rate of 4 per cent. per annum. The lease was assigned and delivered to the Deerks at that time. The following Sunday, November 25, the Deerks again went onto and examined the land.

Babcock undertook to sell the notes and, having first offered them to a competitor bank in Chappell, also a bank in Sidney, Nebraska, then offered them to the defendant bank, who, through its cashier, refused to purchase. It was later suggested to Murphy, the president of the bank, that he might arrange to trade securities for a part of the purchase price of the notes, and an agreement was finally reached whereby Murphy, for the bank, purchased the notes aggregating $6,500 at a discount of $1,000, paying therefor $500 in cash, a mortgage on 320 acres of land in eastern Colorado for $1,500, to which the bank examiner was making objections, and upon which the interest was in default, and the balance, $3,500, in nonnegotiable certificates of deposit issued by the bank, due the following September. Before the deal was closed with the bank, Babcock, Smith, DoRan and Murphy, on Monday, November 26, went to plaintiffs' place and there saw the older Deerk and his son Albert. There is conflict in the testimony as to just what was there said between the parties. Babcock, Murphy, Smith and DoRan claim that the elder Deerk, upon being informed that Murphy was considering the pur-

chase of the notes, answered that he would rather Murphy had them than any one else; that he had seen the land and was satisfied with the deal, and gave no information of any facts which could put Murphy upon inquiry, but consented that he should purchase them. The elder Deerk's account of the interview is somewhat different. He says that Murphy and the others came to his place, and "they wanted to buy these notes; they made another agreement to buy them, and they asked me if it was all right with me, and I told them 'We always done business, be all right with me, but it wasn't nothing in my line of business; it is the boys for it.'" On cross-examination he also said: "I told him it was all right with me on account I been doing my business with that bank since it started, and I says, 'I ain't got nothing to do with it; it is for the boys.'" He further said: "Babcock leaned past me and said the land was ours. I told him I didn't think so; looked to me like there was something wrong." He denies telling Murphy that he had examined the land and that he was satisfied with the deal.

Albert Deerk, who was there present, says that Murphy told him he was going to buy the notes and asked if it was all right with them, when he said: "I don't know; I wouldn't say you should buy them until you see my brother." He denies that any statement was made as to their having visited the land or being satisfied with the deal.

John Deerk, Jr., the brother to whom Albert refers, testified that on being informed that Murphy wanted to see him he went to the bank, when Murphy said: "I want to buy those notes; I seen your father and your brother and they said it was up to you." He then says: "I told him it was all right, but he should look everything over and see whether everything was all right."

Immediately after the trade was consummated in Julesburg, the Deerks took their lease home, where it was read over to them by their sister, who was better able to read than they. It is evident that they soon became suspicious of the deal. The Deerks say it was represented to them as one of the inducements to trade that, under the lease,

the state of Colorado agreed to pay $1.50 an acre each time the land was plowed; and that there was a credit with the state of Colorado for improvements to the amount of $6,600, which must be paid by any person taking the lease from them. They produced the paper upon which DoRan had written: "Improvement credit at State 6,600," and "yearly rental to state $403.70." We are satisfied these statements were made to the plaintiffs.

Counsel for the bank insist that the plaintiffs are entitled to no relief in this action because there was no testimony as to the actual value of this school lease. While it is true no direct testimony was offered on that matter, it does appear from the record that Babcock was selling it for $3,500 and that the representations as to the price to be paid for plowing and the $6,600 credit were false. We are satisfied that the evidence justifies a finding that the plaintiffs were induced to buy through fraud.

This, then, leaves the question as to whether the bank took the notes in question in good faith, for value, and without notice of any defect in the title of the person negotiating the same.

It seems that Murphy, for the bank, was not willing to rely upon the apparent regularity of the notes, but insisted upon making an independent investigation, going to the makers and requesting their consent that he purchase. The Deerks, while they entertained suspicions as to their purchase, were evidently ignorant of the steps necessary to be taken for their protection. The father, while he stated "it would be all right with him," finally left it to the boys to determine. Albert refused to give his consent but left it to the brother John, who, according to his testimony, gave his consent conditioned, however, that the bank should "see whether everything was all right." This was immediately after John, Jr., had been to DoRan asking for an explanation, saying the lease did not seem to read right, and had been by DoRan assured that it was all right and they should take the lease and farm the land. Murphy has no recollection of this statement of John, but does say that he looked entirely to the elder Deerk.

It is apparent that at this time the Deerks were without full knowledge of the character of the fraud that had been perpetrated upon them. It is quite evident that had Murphy, at the time he first interviewed these plaintiffs, made even a casual inquiry, he would have discovered the fraud, as he did, in fact, the day after. The next day, when the Deerks came to the bank, at Murphy's request, to execute new notes in substitution for those he had taken, he discovered through inquiry facts which caused him to advise plaintiffs to stop payment of the $500 check which they had given on the purchase price. As soon as he learned of the representation that the state would pay $1.50 for plowing, he expressed doubt, asked to see the lease, and advised steps toward rescission of the contract, which he carried out by notifying the bank upon which the check was drawn to stop its payment.

The elder Deerk had been a patron of the bank. The president, Murphy, had a high regard for his honesty, ability and frugality; he had theretofore owed the bank a fairly large amount and paid it satisfactorily. The president states that he understood the boys were "pretty good farmers and got quite a lot of machinery that is clear," the testimony was $15,000 to $20,000 worth. The bank purchased with knowledge that the notes were given for the lease in question, and with confidence in the honesty and ability of the makers, took them under an arrangement which amounted practically to an exchange of securities, paying but $500 in money, a questioned mortgage and nonnegotiable certificates of deposit. Counsel for the bank err in stating that the testimony does not disclose these certificates of deposit to have been nonnegotiable. It is hardly possible that Murphy, in the banking business in the western part of the state, was not aware of the exorbitant price the plaintiffs had agreed to pay for the school lease; and the mere fact that the holder of notes, made by persons in whose honesty, integrity and frugality the bank had confidence, was willing to part with them for the consideration in this case by the bank paid would ordinarily raise a ques-

tion as to their inception, and bears upon the question of good faith.

At the outset, it seems apparent, so far as the purchase price paid by the bank is represented by its certificates of deposit in the sum of $3,500, it cannot be held to be a holder in due course. These certificates were issued November 26, 1928, payable the following September, and, as stated by the bank's witness Babcock, were nonnegotiable. The next day after the bank took the notes its president learned from the plaintiffs such facts as caused him to advise them to stop payment on their check given as part of the purchase price for the lease. January 3, 1929, the bank was notified in writing by the attorney for the plaintiffs that they would refuse to pay the notes, and "that unless they receive back their notes and mortgage in the next ten days they will start legal action for their recovery." The certificates of deposit had not then been paid, and, in fact, were not paid until the following March, and then only by the conveyance of lands as to the value of which there is no proof.

It is expressly provided by our negotiable instruments law:

"Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him." Comp. St. 1922, sec. 4665.

And foreclosing all question on the proposition, this court, in *Minatare Bank v. Wilson,* 112 Neb. 216, said:

"We regard it as a well-settled proposition that, where a bank purchases a note and payment is not made therefor except by the giving of credit on the bank's books, or the issuance, as in this case, of a nonnegotiable certificate of deposit maturing at a later date, the purchasing bank does not become entitled to protection as a *bona fide* holder so long as no part of the deposit is drawn out or the certificate has not been paid or become an absolute outstanding liability of the bank. As long as the amount to be paid re-

mained in such condition, the bank, if it received notice of the fraud, was still in position to return the note and cancel the credit."

The rule is again recognized and announced in *Howells State Bank v. Hekrdle,* 113 Neb. 561. It seems clear that the bank, in the present case, is in no condition to claim as an innocent holder so far as the purchase price is represented by its nonnegotiable certificates of deposit. Our statute provides:

"Every holder is deemed *prima facie* to be a holder in due course, but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course." Comp. St. 1922, sec. 4670.

And also provides:

"The title of a person who negotiates an instrument is defective within the meaning of this chapter when he obtained the instrument, or any signature thereto, by fraud." Comp. St. 1922, sec. 4666.

The evidence establishes that the notes in this case were obtained by fraud, and therefore the title was defective when they were negotiated to the bank. Under these circumstances, the burden is upon the bank to prove that it took the notes in good faith, in ordinary course of business, without notice of any defense thereto or defect of title in the holder. It has long been the accepted rule in this state that:

"Where fraud in the inception of a note is pleaded as a defense and supported by proof, in an action by an indorsee against the maker, the burden is on plaintiff to show he is a *bona fide* holder." *Central Nat. Bank v. Ericson,* 92 Neb. 396.

See *Wyman v. Searle,* 88 Neb. 26; *Kelman v. Calhoun,* 43 Neb. 157; *Haggland v. Stuart,* 29 Neb. 69; *Stephenson v. Perry,* 112 Neb. 294; *Howells State Bank v. Hekrdle,* 113 Neb. 561; *Union Nat. Bank v. Moomaw,* 106 Neb. 388. And the reason for the rule applies in this case, where the maker seeks affirmative relief against the claim of an indorsee; and it falls fairly within the statutory provision.

The holder of negotiable paper in due course, without knowledge of facts which impeach its validity between the antecedent parties, holds it by good title; but if it be shown that the holder took it under such circumstances as show bad faith or want of honesty on his part, whether proved by direct or circumstantial evidence, then the holder of such paper so taken is subject to existing defenses between the antecedent parties. *Dobbins v. Oberman,* 17 Neb. 163; *Myers v. Bealer,* 30 Neb. 280. The testimony presents the question as to whether the bank took with knowledge of such facts and circumstances as show want of honesty or indicate bad faith on its part. This court, in *First State Bank of Pleasant Dale v. Borchers,* 83 Neb. 530, said:

"To constitute bad faith, the buyer must have had knowledge of infirmities in the note, or have had a belief based on circumstances known to him that there was a defense thereto, or the evidence must tend to prove that the purchase was made under such circumstances as indicate bad faith or a want of honesty on the part of the indorsee."

The district court, which had an opportunity to see and observe the witnesses, evidently accepted the testimony of the plaintiffs and decided this issue against the bank. This court is required to try the issues *de novo,* without reference to the findings of the trial court; but it is nevertheless the well-settled rule in Nebraska that, where the testimony of witnesses orally examined before the court is conflicting, so that both versions of the transaction cannot be true, this court will consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version rather than the other. *Shafer v. Beatrice State Bank,* 99 Neb. 317; *Walton v. Porter,* 107 Neb. 264. It seems apparent that the trial court accepted the version of the plaintiffs and believed that the elder Deerk in the presence of the bank's president, before the purchase of the notes, made the statement that he felt there was something wrong with the deal and did not believe they had the land; that Albert would not say that Murphy should buy the notes, but left it to John; and John, on his part, gave consent, conditioned that the bank should see that the

deal was all right; and further believed that the bank, which knew the makers of these notes, believed in their honesty, knew that they had a large amount of machinery, and that they had theretofore been a patron and had paid their obligations, acted in bad faith when it purchased their paper from a holder who was willing to make a ruinous discount and accept but $500 in money, together with a more or less discredited real estate mortgage, as to the value of which it offered no proof, and the certificates of deposit mentioned. The attitude of the bank on the day following its purchase of the notes, when it assisted the plaintiffs in stopping payment on their check, but took no steps in protecting them against the portion of its unpaid purchase price, should have some bearing in determining its intention to deal fairly with the plaintiffs.

In view of the whole situation, we are unable to say that the bank has met the burden of proof required in order that it may be adjudged a holder in due course. The facts in the present case do not bring the parties within the rule asserted by the bank that, where a person gives his reasons for doing or not doing a certain thing involved in a transaction, he cannot, after litigation has been begun, change his ground and put his contention upon another and different consideration. The judgment of the district court is

AFFIRMED.

CORA C. DOW, ADMINISTRATRIX, APPELLEE, V. WALTER LEGG, APPELLANT.

FILED JULY 17, 1930. No. 27245.

1. **Death:** DAMAGES. In actions for death caused by wrongful act, neglect, or fault, brought under the provisions of sections 1382, 1383, Comp. St. 1922, for the benefit of the surviving widow and children, it is improper to submit to the jury loss of companionship as an element of damage, except under special circumstances where it can reasonably be said that under the evidence it has a monetary value.
2. **Trial:** ORAL INSTRUCTIONS. The giving of an oral instruction to the jury in regard to the principles of law applicable to the

case and to the evidence, without a waiver of the statutory requirement that it be in writing, is reversible error.

3. Evidence examined and *held* to justify the judgment of dismissal as to two of the defendants named in the action.

APPEAL from the district court for Dawson county: ISAAC J. NISLEY, JUDGE. *Affirmed in part, and reversed in part.*

Fradenburg & Matthews, J. G. Thompson, William A. Stewart and *William P. Kelley,* for appellant.

Sidney T. Frum, Craft, Edgerton & Fraizer and *T. M. Hewitt, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD and DAY, JJ., and JAMES and WRIGHT, District Judges.

WRIGHT, District Judge.

This action was brought by the administratrix to recover damages for alleged wrongful death of Henry V. Dow, who left surviving as his heirs and next of kin, his widow, the administratrix, and three minor children, for whose benefit the action was brought under authority given by sections 1382, 1383, Comp. St. 1922, commonly referred to as Lord Campbell's Act. Walter Legg, Charles E. Wagner, Roy Lieb, and Silas Lieb were made defendants. The parties will be designated, as in the court below, plaintiff and defendants, respectively.

The plaintiff, as administratrix, alleged that on August 27, 1927, the defendants Legg and Wagner, together with the deceased, Dow, and four other persons, all being connected with the sales organization of the Delco Light Company, started to go by automobile from Omaha, Nebraska, to the home of the defendant Wagner, in Miltona, Minnesota, where they were invited by Wagner, who was state manager and distributor for said Delco Light Company, on a week-end pleasure trip as a reward for winning a sales contest among the salesmen, contesting with other states; that the party was traveling in three automobiles, the deceased, Dow, being in the one owned and driven by defendant Legg; that, at a point on the highway a short distance

north of Homer, Nebraska, the car driven by Legg collided with the car driven by defendant Roy Lieb, and as a result of the collision plaintiff's decedent, Dow, was instantly killed. It is alleged that both Legg and Roy Lieb were negligent in the operation of their respective cars, which negligence caused the death of Dow; that Legg, at the time, was in the employ and under the direct supervision of the defendant Wagner, and Roy Lieb was driving a car owned and kept by his father, Silas Lieb, as a family car and for which purposes the same was being driven. At the close of all the testimony, plaintiff's action against Wagner and Silas Lieb was dismissed. A verdict was returned against defendants Legg and Roy Lieb, upon which judgment was entered and from which judgment defendant Legg has appealed.

Defendant Legg assigns as error the giving of instruction No. 14, as to the measure of damages, and in which the jury were told: "You should further take into consideration the loss of support that the plaintiff may have suffered and each of her children, and the services and companionship that she and each of her children may have suffered as the result of the death of the decedent." It is insisted that the court erred in submitting to the jury as one of the elements of damage the loss of companionship suffered by the widow and children. At common law, the right of action for an injury to the person abated upon the death of the injured individual. The right to recover damages for such an injury exists solely by statute, but the compensation or indemnity which may be recovered is limited by the enactment creating the right. *McKay v. Dredging Co.*, 92 Me. 454.

The Nebraska statute referred to, section 1383, Comp. St. 1922, under which this action was brought, provides that, in actions of this character, "the verdict or judgment should be for the amount of damages which the persons in whose behalf the action is brought have sustained." In construing this statute, the court, in *Ensor v. Compton*, 110 Neb. 522, after calling attention to the change in the statute made by the amendment of 1919, said:

"The loss under the statute is still a pecuniary loss. Nothing can be allowed on account of mental suffering or bereavement or as a solace on account of such death."

A pecuniary loss has been defined as "a loss of money, or of something by which money or something of money value may be acquired." *Bouvier's Law Dictionary.* See *Green v. Hudson River R. Co.*, 32 Barb. (N. Y.) 25, 33.

In *American R. Co. of Porto Rico v. Didricksen*, 227 U. S. 145, the supreme court of the United States, in discussing the right of recovery for death under the employers' liability act of April 22, 1908, said:

"The cause of action which was created in behalf of the injured employee did not survive his death, nor pass to his representatives. But the act, in case of the death of such an employee from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute. The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employee. The damage is limited strictly to the financial loss thus sustained. * * * The loss of the society or companionship of a son is a deprivation not to be measured by any money standard. It is not a pecuniary loss under such a statute as this."

Again, the same court, in *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, in construing the employers' liability act of 1908, said:

"This liability is for pecuniary damage only, and the statute should be construed in this respect as Lord Campbell's Act has been construed, not as granting a continuance of the right the injured employee had, but as granting a new and independent cause of action. * * * A pecuniary loss or damage must be one which can be measured by some standard. It is a term employed judicially 'not only to express the character of the loss of the beneficial plaintiff which is the foundation of the recovery, but also to discriminate between a material loss which is susceptible of pecuniary valuation, and that inestimable loss of the

society and companionship of the deceased relative upon which, in the nature of things, it is not possible to set a pecuniary valuation.' "

In *Kennedy v. Byers,* 107 Ohio St. 90, that court, in discussing the rights conferred by the Lord Campbell's Act, said:

"The right to maintain an action of the character of that involved in this case is covered by statute, and the method of bringing the action, as well as the provision specifying those who may share therein as beneficiaries, are both matters of statute, in the absence of which such action could not be maintained. The right conferred is accompanied by the limitation imposed, and the benefits thereof cannot be secured and enjoyed free from the restrictions and limitations which are a part of the same provision."

No attempt was made to prove any circumstances, special or otherwise, where the companionship of the husband and father had any pecuniary value. The widow testified as to the amount furnished by the deceased during his life for the support of the family, and the children testified as to the character of the home and support furnished. No reference was made to any association or companionship with the deceased or as to any facts which would tend to prove or disprove the value of his association or companionship.

The defendant Legg was entitled to have submitted those elements only which, under the evidence, the jury should consider in fixing the amount of recovery. The instruction enlarged upon the matters the jury could, under the law and the evidence, consider, and was prejudicial to the rights of the defendant.

At 9 o'clock in the nighttime, the jury returned into court, when, without the presence of defendant or of his counsel, the following occurred:

"Mr. Benham (foreman of the jury): May it please the court, there is one thing that some of the jurymen want explained. Here is one verdict, plaintiff against both defendants, fixing the amount of her recovery, and one against Roy Lieb. Can they split them up and make one more than

the other if they find them both guilty, in different amounts? The Court: Yes; if you find one was more guilty than the other, you have a right to determine which amount that you have determined on. Mr. Benham: Each one should pay? The Court: Yes. Mr. Benham: We will have that here in five minutes. The Court: If that is in your mind, I would like to see those forms. Mr. Benham: All right. The Court: Gentlemen of the jury, the court, after considering the matter, is of the opinion that if you find for the plaintiff, that the plaintiff has suffered an injury as the result of the negligence of Walter Legg and Roy Lieb, form No. One conveys that intention, and that you cannot divide the different items or the various amounts as between the two defendants which will have to be concurrent negligence what made the injury complained of, if you should find against both of them. The former statement that you could find so much against each individual is incorrect. Mr. Benham: We will have that here in five minutes."

The remarks of the court amount to an instruction in regard to the principles of law applicable to the case and the evidence. The jury were told that it must be concurring negligence which caused the injury complained of, if the finding was against both; and, likewise, that under the law they could not apportion the damages. This seems clearly to be an oral instruction such as is prohibited by the statute, and is, by the defendant Legg, assigned as error.

Section 8794, Comp. St. 1922, requires the district judge in both civil and criminal cases, to reduce his instructions to writing unless waived by counsel in open court; and in this case there was no such waiver. Section 8796 requires these written instructions to be read over to the jury; and section 8798 provides that no oral explanation shall in any case be allowed, and that the giving of an instruction by the court, not reduced to writing, shall be error in the trial of the case and sufficient cause for the reversal of the judgment rendered therein.

When the legislature has provided specific rules of court procedure intended for the protection of litigants, the

courts should not countenance a flagrant departure therefrom. It has long been a settled rule recognized by this court that the giving of an oral instruction in regard to principles of law applicable to the case, without a waiver of the statutory requirement that they be given in writing, is reversible error. *Hartwig v. Gordon,* 37 Neb. 657; *Ehrlich v. State,* 44 Neb. 810. The giving of the oral instruction in this case was error.

Defendant Legg, as one of his defenses, alleged that, at the time of the death of plaintiff's decedent, he and said decedent were engaged in a joint enterprise for the mutual and equal benefit of both, and the control, operation and direction of the car in which they were riding at the time of the accident was under the joint control and direction of both defendant and said decedent. The court submitted this defense in instruction No. 3, but later recalled the jury and withdrew it by drawing a line through that portion of the instruction, evidently having concluded that the evidence did not support the allegations. Nevertheless, in a later instruction, the jury were told that before they could return a verdict against the defendant Legg they must find from a preponderance of the evidence that Legg and Dow were not engaged in a joint enterprise. No definition of the term "joint enterprise" was given to the jury, although defendant Legg requested an instruction defining the term and submitting the issue.

Defendant complains of the action of the court, both in withdrawing the issue and in refusing the instruction tendered. Since the case is to be tried again, when the question must be determined upon the testimony then introduced, it seems unnecessary to decide at this time as to this assignment of error. It may be well, however, to call attention to the rule this court has given concerning a joint enterprise, as follows:

"If, however, two or more persons unite in the joint prosecution of a common purpose, under such circumstances that each has authority, express or implied, to act for all in respect to the conduct or the means or agencies employed to execute such common purpose, the negligence of any one

of them in the management thereof will be imputed to all of the others." And further: "Whether a person riding in the automobile of another is engaged in a common enterprise with the latter is a question for the jury, where it is an issuable fact in the case." *Judge v. Wallen*, 98 Neb. 154.

We do not deem it necessary to discuss the other assignments of error, since upon a retrial it is quite probable the questions will not arise. For the errors herein mentioned, the case should be remanded for a new trial.

The plaintiff has appealed from the judgment of the district court dismissing the action against the defendant Charles E. Wagner, at the close of all the testimony. Before the defendant Wagner can be held liable, the evidence must establish between Wagner and Legg the relationship of master and servant or principal and agent; and that negligence on the part of Legg, while acting within the scope of his employment or carrying out his duties as the agent of Wagner, was the proximate cause of Dow's death. Unless evidence was introduced fairly establishing these facts, either by direct evidence or proof of circumstances from which they could be reasonably inferred, Wagner was not required to offer any testimony.

From a careful examination of all the evidence, we do not discover sufficient proof of the status of either master and servant or principal and agent, so far as the acts of Legg are proved in connection with or leading up to the accident in question. It was developed that Wagner was state distributor in Nebraska for the products of the Delco Light Company, and in the sales organization there was a department termed the Frigidaire department. Legg and Dow were field supervisors in the Delco Light Department. Wagner invited a number of those connected with the sales organization, including Legg and Dow, to his home in Minnesota for a week-end party. It is apparent that Wagner did not undertake to provide for the transportation of the members of this party, other than himself, from Omaha to the Minnesota home. Legg, called as a witness for the plaintiff, states: "Well, they were depending on me taking my car, the bunch was; that was naturally assumed that I

was going to take my car, my automobile." It seems that there was some discussion between the members of the party as to whose car should be driven. Legg made some objections to driving his car and states: "I went back and told Wagner, I thought maybe he would have some suggestions of his own, as to who should take a car, and he didn't have." It is apparent that six of the members of the sales organization were accepting Mr. Wagner's invitation to spend the week-end in his home in Minnesota. Wagner, however, did not undertake to pay the expenses of the trip or to do anything more than furnish the entertainment at the home. While Wagner, himself, made one of the party, starting out from Omaha, he paid no part of the expenses other than his own, and so far as Legg is concerned those parties riding in his car looked after their own. It is apparent that none of these parties were required by Wagner to take the trip, but it seemed to be left to their choice. Viewing the situation as a whole, we are satisfied the court committed no error in entering judgment dismissing the cause of action against Wagner.

Plaintiff has also appealed from the judgment of the district court dismissing the cause of action against defendant Silas Lieb. The action was brought against this defendant on the theory that the car driven by Roy Lieb was being used under such circumstances as would constitute him the agent of Silas Lieb, under the "family car" rule, as adopted by this court; that Silas Lieb was the owner of the car and had furnished it to the members of his family, of whom Roy constituted one, for their use and pleasure, and that on this occasion the car was being put to the purposes for which the defendant had furnished the same. The evidence establishes that Roy Lieb, an adult, had taken the car on this occasion without the consent and against the express command of the father; that he had never been permitted to drive the car, and the defendant Silas Lieb had no knowledge that the same was being used on the occasion in question. The evidence falls far short of establishing any liability on the part of Silas Lieb, and the

action of the district court in dismissing the cause against him was proper.

The judgment of the district court dismissing the action against defendants Charles E. Wagner and Silas Lieb is affirmed. The judgment of the district court against the defendant Legg is reversed and the cause remanded for a new trial.

AFFIRMED IN PART, AND REVERSED IN PART.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1930.

PETERSON, SHIRLEY & GUNTHER, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

FILED SEPTEMBER 23, 1930. No. 27343.

1. States: CLAIMS: ACCEPTANCE OF APPROPRIATION. If a claimant accept the amount appropriated by the legislature in payment of his claim against the state, his claim for any balance thereof will be barred.
2. ———: ACTION: BURDEN OF PROOF. When a claimant, by authority of a resolution of the state senate, sues the state on a *quantum meruit* for work done for the state, the burden is on the claimant to prove his cause of action by a preponderance of the evidence.

APPEAL from the district court for Lancaster county: ELWOOD B. CHAPPELL, JUDGE. *Affirmed.*

C. F. Reavis, for appellant.

C. A. Sorensen, Attorney General, L. R. Newkirk and *Homer L. Kyle, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

PER CURIAM.

Plaintiff, a copartnership, appealed from a decree against it for costs and dismissing its causes of action.

Plaintiff's causes of action grew out of its contracts with the state for the construction of roads for various federal aid projects in Nebraska prior to 1925. There was considerable money due plaintiff for which settlement had not

been made chiefly because of lack of money in the road fund to pay the state's share and partly because the state also asserted a counterclaim against plaintiff which plaintiff was unwilling to concede.

All claims involved in this suit were presented to the legislature of 1925 in an effort to get an appropriation to pay them. The legislature included in its deficiency appropriation bill, for this and other purposes and persons, the sum of $144,484.34 in favor of plaintiff. The act (Laws 1925, ch. 27), passed with an emergency clause, was approved March 31, 1925. It provides "that the several amounts herein appropriated shall be in full of claims owing by the state of Nebraska to said beneficiaries in whose favor said appropriations are made; that the said auditor of public accounts shall not deliver any warrant for any item herein appropriated until a receipt in full is filed by the beneficiary thereof."

The evidence shows that the legislature arrived at the amount of the appropriation by the following steps: There was considered as due plaintiff for the road work on the projects here involved a total of $301,385.14, of which $97,650.59 would shortly be furnished by the federal government to the state and paid over (as it was) to plaintiff, and that the state, on its own account, was chargeable with the balance of $203,734.55; on the 28 items making up this balance, the legislative committee allowed interest on each at 7 per cent. from the date it was considered due until January 1, 1925, making the total of $18,385.13 interest, the said balance and interest thereon aggregating $222,119.68; the state, however, claimed $66,477.15 from plaintiff for equipment sold or rented by it to plaintiff or to parties for whose payment the state claimed plaintiff was liable; on this item 7 per cent. interest was also computed, producing $11,158.19, and making the total of principal and interest claimed by the state on its counterclaim $77,635.34. The legislature deducted this counterclaim from the $222,119.68 and appropriated the balance of $144,484.34.

On March 25, 1925, which was six days before the above named appropriation act was approved, the senate had passed a resolution reciting that differences exist between the plaintiff and the state relative to the amount due plaintiff for work done and materials furnished in the construction and repair of certain public highways within the state, and authorizing plaintiff to sue the state for all such demands arising out of such contracts.

About the middle of April, 1925, the plaintiff accepted from the state auditor a warrant for the amount appropriated by the legislature and gave to the auditor its receipt in full. The receipt specified that it was accepted as "payment in full of the claims mentioned in the within voucher" totaling $203,734.55 principal and $18,385.13 interest, or a grand total of $222,119.68. The claims mentioned in the voucher covered 28 different road projects. They were the items taken into consideration by the legislature in making the appropriation.

Soon after cashing its warrant the plaintiff brought suit against the state, relying on the authority of the senate resolution of March 25, 1925. In its amended petition it had 15 causes of action. When the case was tried it abandoned all but eight of these causes. Seven of the eight causes were based on work done on projects on which claims were presented to the legislature and on projects listed in the voucher receipted in full by the plaintiff when it received the warrant for the money appropriated by the legislature.

Only the thirteenth cause of action was based on a claim arising out of a project not shown among its 28 projects listed in the voucher receipted by the plaintiff as the consideration for the warrant for the deficiency appropriated by the legislature for the benefit of plaintiff. We think the evidence shows that this item was considered by the legislative committee but that it failed to appear on the voucher because it was for a claim on *quantum meruit* for extra gravel claimed to have been ordered put on road project 39 in Dawson county and settlement had been made on this project as originally contracted for. The officials repre-

senting the state claimed that the gravel was required by the contract. The legislature did not allow the claim. The auditor did not list it in the voucher receipted by plaintiff.

As to the causes of action which were comprehended within the legislative appropriation we think the law is well settled and well understood. The general principle is laid down in 1 R. C. L. 198, sec. 34, in these words: "If the claimant accepts the amount appropriated by the legislature in payment of his claim, his claim for the balance will be barred." This is the substance of the rule announced in *Calkins v. State,* 13 Wis. 434, and in *Massing v. State,* 14 Wis. 544; it being understood that there is no evidence of fraud, accident or mistake in matter of fact. The supreme court of the United States has laid down the rule that, even where the finding of the amount due is later accepted with knowledge that it is less than the amount claimed to be justly due, it will operate as a bar to further recovery. *United States v. Adams,* 7 Wall. (U. S.) 463; *United States v. Child & Co.,* 12 Wall. (U. S.) 232; *United States v. Clyde,* 13 Wall. (U. S.) 35; *Hemingway v. Stansell,* 106 U. S. 399. In the last cited case, the opinion written by Mr. Justice Gray, it was held that "the settlement and receipt bound the contractors as an accord and satisfaction, and they could not maintain a suit upon the original contract to recover further compensation for the work."

As to the causes of action now under discussion, the evidence shows that the receipt executed by the plaintiff, before the delivery by the auditor of the warrant for the full amount appropriated by the legislature, clearly identified all the projects which are the bases of the claims upon which these causes of action were founded. Before executing that receipt and accepting the voucher, it was the duty of the plaintiff to consider and to decide whether it would take the sum appropriated or whether it would rely on the authority of the senate resolution and sue the state for all claims it had against the state and disregard the appropriation. It elected to execute a receipt for the warrant and to specify as a consideration therefor the settlement of each and every project item listed in the receipt. There was

no fraud, accident or mistake of fact on plaintiff's part. It may be that the amount appropriated was far less than it could have proved to be due it and that the counterclaim of the state taken into consideration by the legislature was unjustly allowed in fixing the amount of the appropriation. With those things we have nothing to do, as they belonged to the legislative branch. The plaintiff has by its election made it impossible under the law for us to go behind the receipt. We are of the opinion that plaintiff cannot maintain its suit to recover further compensation for the work done upon the projects involved in these seven causes of action; and that the senate resolution has become inoperative, by act of the plaintiff, as a basis of authority to sue the state upon these causes.

The thirteenth cause of action is the only one remaining. It stands on a somewhat different footing than the others, chiefly by reason of the fact that it involves a project that was not identified by the receipt signed by the plaintiff. It was not listed among the "vouchers" on the front of the general voucher on the back of which plaintiff in its copartnership name acknowledged receipt of the state warrant for $144,484.34 "which we accept as payment in full of the claims mentioned in the within voucher." It would seem that good practice would have caused the highway department to collaborate with the auditor's office so as to have included in the voucher, in compliance with the appropriation act, such information as would be "in full" of all claims in dispute. Yet we can readily understand that these were claims under contracts let years before and doubtless active contractors like these had many projects under construction that were not at all in dispute. This one having been omitted, we shall treat it as if intentionally omitted and as if still contemplated by the senate resolution to be such a dispute as to be the basis of a suit.

The facts in brief are these: Plaintiff had the contract for graveling Project No. 39, Dawson county. It called for an estimated 125,730 square yards of gravel surfacing at 37½ cents per square yard. The plans called for gravel four inches deep. The road project was about ten miles

long. When the approximately estimated quantity of gravel was spread it was found that there were nearly two miles of the project yet to be graveled. Plaintiff has been paid for the contract quantity, but is suing for extra gravel spread upon the last two miles. Plaintiff claims it was ordered to spread the gravel thicker than the contracted four inches and so used the contracted volume on less mileage. The state claims the gravel was not up to the screen tests required by the contract and so it was necessary to require it to be spread thicker. Be that as it may, the work halted for a considerable period with the two miles ungraveled. On September 12, 1924, the state engineer wrote the contractors giving them ten days to proceed to gravel the balance of the road. Shortly thereafter one of plaintiff's partners saw the state engineer and told him if they finished the graveling they would expect to be paid the contract price per yard, but a few days later he received a wire from Mr. Cochran, the state engineer, saying that if plaintiff did not "proceed immediately he would proceed himself and charge it up to us." So plaintiff finished the graveling and sued for the reasonable value thereof, which, at 37½ cents per square yard, for 23,601.55 square yards, amounts to $8,-850.58.

It is to be borne in mind that on this particular project the contract contemplated that the whole mileage of the project would be surfaced by the plaintiff with the estimated and stated amount of gravel, and that, when the controversy arose, the state had paid in full under what it claimed was a mistake. Having discovered that the last stretch had not yet been graveled, the state engineer ordered plaintiff to gravel it or it would be graveled by the state at plaintiff's expense. The plaintiff did the work and now sues, not on the contract, but on a *quantum meruit*, for the reasonable value of its work. It takes the same measure of value per yard as was in the contract but alleges it as the reasonable value. It is elementary that the burden is on the plaintiff to prove its allegations. It must show that there was an express or implied agreement to pay for this so-called extra gravel. We find it has not sus-

tained this burden by a preponderance of the evidence and that the district court did not err in so concluding.

For the reasons stated in this opinion, the judgment of the district court is

AFFIRMED.

STATE, EX REL. ROBERT SMITH, RELATOR, V. FRANK MARSH, SECRETARY OF STATE, RESPONDENT: GEORGE W. NORRIS, INTERVENER.

FILED SEPTEMBER 23, 1930. No. 27643.

1. **Elections**: CANDIDATES: TIME FOR FILING APPLICATION. Section 2114, Comp. St. 1922, as amended by section 1, ch. 108, Laws 1925, now known as section 32-1124, Comp. St. 1929, as to the requirement that the written application of a candidate for a general political office shall be filed in the proper office at least forty days prior to the primary, is mandatory.
2. ———: ———: ———: CUSTOM. No custom or practice adopted or followed by the officer with whom such primary applications are required by statute to be filed within a stated time can avail to extend such time.

Original proceeding by the State, on the relation of Robert Smith, against Frank Marsh, Secretary of State, in which proceeding George W. Norris intervened. *Decision in favor of relator.*

John P. Breen, for relator.

Charles E. Matson, for respondent.

William E. Shuman, for intervener.

C. A. Sorensen, amicus curiæ.

GOSS, C. J.

This proceeding is strictly statutory. It is not a mandamus proceeding but is somewhat akin thereto, as stated by Judge Good in his opinion in *State v. Marsh,* 117 Neb. 579. In respect of the relief asked, this particular case is rather a mandatory injunction. It was instituted pursuant to the provisions of section 2119, Comp. St. 1922, as amended by section 3, ch. 108, Laws 1925, now known as section

32-1129, Comp. St. 1929. So far as applicable, the statute is as follows:

"All certificates of nomination or nomination statements, which are in apparent conformity with the provisions of this article, shall be deemed to be valid, unless objections thereto shall be duly made in writing within ten days after the filing of the same. In case such objection is made, notice thereof shall forthwith be mailed to all candidates who may be affected thereby, addressed to them at their respective places of residence as given in the certificate of nomination * * * on file in that office. * * * The officer with whom the original certificate was filed * * * shall, in the first instance, pass upon the validity of such objection, and his decision shall be final, unless an order shall be made in the matter by the county court, or by a judge of the district court, or by a justice of the supreme court at chambers, on or before the second Wednesday preceding the election. Such order may be made summarily upon application of any party interested, * * * and upon such notice as the court or judge may require. The decision of the secretary of state, or the order of the judge or supreme court justice, shall be binding on all other county, municipal or other officers with whom certificates of nomination are filed."

On July 17, 1930, Robert Smith, a citizen and elector of Omaha, filed in this court this application under the above statute, alleging that on July 5, 1930, one George W. Norris of Broken Bow (not the present United States senator of identical name whose legal residence is at McCook and who had previously duly filed as a candidate at the primaries for the same office) filed in the office of the respondent a nomination application asking to have his name printed upon the official ballots as a candidate for the office of United States senator; that the application was accompanied by the receipt of the treasurer of Custer county for the required filing fee; that on July 8, 1930, pursuant to statute, relator filed an objection and protest against the said nomination application on the ground that it was not filed in the office of the secretary of state 40 days before the date of the

general primary election to be held August 12, 1930; that on July 15, 1930, after notice to all parties, there was a hearing and argument on said matter, and on July 17, 1930, the secretary of state overruled the objections of the relator and entered an order to the effect that, while the nomination application was not actually on file within the said 40 days in the office of the respondent, yet having been placed in the United States mail at Broken Bow on July 2, 1930, it was in effect filed in the office of the secretary of state; wherefore the said Robert Smith prays for an order of a justice of the supreme court directing the secretary of state not to certify the said George W. Norris of Broken Bow as a candidate for United States senator.

Upon filing the application, an order was made requiring the secretary of state to answer by 2 o'clock p. m. the next day, July 18, 1930. Mr. Marsh promptly accepted service of the order and at the time named filed his answer. Notice had also been given to the attorney for George W. Norris of Broken Bow, who appeared and was granted leave for his client to intervene. The answer of the secretary of state shows that it had been the settled practice or custom of himself and predecessors, for a considerable period, to consider as filed in the office of the secretary of state all nomination papers postmarked not later than midnight of the last day for such filings; and that he had announced to the press prior to July 3, 1930, that he would accept, as filed in his office, any nomination application postmarked before midnight of that day. This being a summary matter under the statute and there appearing a need for early disposition of it, an application for a continuance was denied. Also application was made that the judges of the court sit *en banc* and hear the matter. This, too, was denied, and hearing of the evidence and arguments of counsel thereon proceeded and was concluded at a night session. At the conclusion thereof an order was duly made and an oral decision was delivered directing the secretary of state to omit from his certification of candidates for United States senator the name of George W. Norris of Broken Bow. It appearing desirable that an opinion should be written for whatever

value it may have in the future to candidates, to officials and to the profession, this opinion is prepared.

Section 2114, Comp. St. 1922, as amended by section 1, ch. 108, Laws 1925, now known as section 32-1124, Comp. St. 1929, provides: "The name of no candidate shall be printed upon an official primary ballot unless at least forty days prior to such primary, either he, or twenty-five qualified electors of the party with which such candidate affiliates, shall have filed a written application with the proper authority and in substantially the following form." It is conceded July 3 was the last day for political filings for the general primary of August 12, 1930, and that a filing later than that would be less than 40 days prior to the primary. But the facts showed as pleaded in the answer that it had been the custom for a long time to receive filings if postmarked within the legal filing time, and the secretary of state caused to be published by newspaper men that in this instance he would receive filings for the primary if postmarked any time on July 3, 1930. The evidence shows that the nomination application of George W. Norris of Broken Bow was postmarked July 2, 1930, was sent by registered mail, addressed to the secretary of state, Lincoln, was received at the post office at Lincoln shortly after 1 o'clock p. m., July 3, and was not delivered at the office of the secretary of state until the morning of July 5, 1930. It did not arrive at the post office in time July 3 to be handled as a registered item and to be taken to the Capitol in due course of mail that afternoon and there was no delivery on the following holiday.

It is argued by the respondent and by the intervener that the statute as to the time of filing is merely directory and that the custom of the office and the notice given to candidates and to the public that filings arriving by mail after July 3, if postmarked then or before, justified the secretary of state in considering this filing as if made within the statutory 40 days before the primary. In their argument for a liberal construction of the statute they quote from the first section (section 2091, Comp. St. 1922, section 32-1101, Comp. St. 1929) of the primary law the words: "This ar-

ticle shall be liberally construed so that the real will of the electors may not be defeated." But the meaning of the section is not full and complete without the remaining words of the section following the word "defeated," namely, "by an informality or failure to comply with all the provisions of law in respect to either the giving of any notice or the conducting of the primary or certifying the results thereof." The intent of the legislature seems to have been to direct the attention of executive officers and of the courts to a liberal construction in the interest of furthering "the real will of the electors" (rather than candidates) by lack of technicality as to (1) the giving of any notice, (2) or the conducting of the primary, (3) or certifying the results thereof. So far as anything appears in the section or the act, the legislature has expressed no particular concern for any liberality of construction in order that the will of a would-be candidate should be favored and that jurisdiction be given his candidacy unless he comply with the terms of the law. A very good reason inheres in the demand for liberal construction as to the electors themselves. They are so numerous as compared even with candidates at a primary that the legislature, realizing that they could not well check official acts relating to elections in advance and desiring them to be protected against faulty notices of electors, or technical faults in the conduct of elections or in the certification of the results thereof, adopted this highly proper section.

An illustration of such a liberal construction by the courts in order to carry out the will of the elector is found in *State v. Russell*, 34 Neb. 116. There the early "Australian ballot law" adopted in 1891 was that same year up before this court for consideration as to whether ballots should be counted when marked by the electors in pencil, although the statutes provided they should be marked in ink. This court held that "the provision * * * for the marking of ballots with ink is directory only, and ballots, if in other respects regular, will, in the absence of fraud, be counted, although marked with a pencil." The respondent in his written conclusions of law, when he passed upon the

Norris application, misinterpreted the citation of *State v. Russell, supra,* by Judge Letton, in the opinion written by him in *Richmond v. Breithaupt,* 110 Neb. 859. On page 862 the opinion said: "The statutory provisions relating to elections are not mandatory, but directory. *State v. Russell,* 34 Neb. 116." One must estimate the meaning and effect of an opinion by what is under consideration by the court and is being discussed by the writer of that opinion. The quoted words were used in argument. They were not repeated nor reflected in any way by the court in the syllabus of the case. The question involved was whether certain ballots, if marked and cast by electors, should be admitted in evidence in an election contest. The act of marking the ballot was purely an act of the voter. The thought of the writer of the opinion was fixed on that and so as to that he concluded that the statute was not mandatory but was directory. Neither in *Richmond v. Breithaupt, supra,* nor in *State v. Russell, supra,* has any such unqualified proposition of law been adopted with relation to the entire election law.

They cite also *State v. Amsberry,* 104 Neb. 550, where the statute relating to liberal construction was incidentally referred to in the course of the opinion. In that case John H. Morehead was nominated as a candidate for governor by the petition of the requisite number of electors. The petition was filed with the secretary of state on March 20, 1920, which was the last day for such filings on that year as the statute then stood. The candidate so nominated by petition had five days within which to accept. But, and this was the turning point of the case, unless objection was filed within three days after the nominating papers were filed, the statute deemed them to be valid. The county treasurer's receipt for the filing fee had not been filed, though the fee had been paid on March 20. No objections were made within the statutory three days, and before the five days expired Mr. Morehead telegraphed his acceptance and the treasurer telegraphed that the fee had been paid on March 20. Before the five days expired the secretary of state had received and filed both the receipt of the treasurer and the formal acceptance of Mr. Morehead. The single

syllabus in the case puts the decision on the ground that the certificate of nomination must be deemed valid because no objection was made to it within the three-day period after it was filed. While the opinion did not cite the case, it was in line with the holding in *State v. Piper*, 50 Neb. 40, to the effect that the statute, requiring objections to a certificate to be made within three days after its filing, is mandatory.

The nearest identical case we have been able to find, in facts and in principle, is that of *Seawell v. Gifford*, 22 Idaho, 295. It is found also in Annotated Cases, 1914A, 1132, and has attached to it there a helpful note on the subject of the mandatory character of such election statute. In that case the certificate was actually filed in the office of the secretary of state 29 days before the primary election, whereas the statute required it to be filed not more than 60 days nor less than 30 days before the election. It was held that this provision of the statute is mandatory and that a certificate presented for filing 29 days before the election cannot be legally filed by the secretary of state. In the attached note to which reference has been made are many cases, particular reference to which would unduly extend this opinion. The writer of the note well states the effect of the great trend and weight of authority when he says: "Although the statutes on the subject of time for filing certificates of nomination vary in their wording, they are usually held to be mandatory."

In the case last discussed the filing was tendered in person. In the case at bar it was sent by registered mail and received by the secretary of state after the statutory time for filing had expired. But the secretary held that, because it was postmarked within the legal filing time and it was long the custom of that office, particularly announced in advance in 1930, to consider such a certificate so mailed as filed when mailed, it was therefore valid. In *State v. Erickson*, 152 Minn. 349, the statute required the affidavit initiatory of a candidacy at the primary election to be filed at least 40 days before the election. The affidavit was mailed the last day for filing but was not received until the next

day. The court held that the statute was mandatory, that the depositing in the mails was not a substitute for filing, and that the frequent practice of receiving such filings when so mailed was not such an interpretation or construction of a plain and unambiguous statute as would be accepted as a correct interpretation of the statute.

In *State v. Falley*, 9 N. Dak. 464, the statute required certificates of nomination to be filed with the secretary of state not less than 30 days before election. It was held that a certificate filed 29 days before the election could not be legally filed by the secretary, and that the statute is mandatory.

In *Hollon v. Center*, 102 Ky. 119, it was held: "One who files a certificate of nomination less than fifteen days before the election is not entitled to have his name printed on the ballot, that requirement of the statute being mandatory." *Brodie v. Hook*, 135 Ky. 87, likewise holds the provision mandatory. To the same effect is *Cramton v. Secretary of State*, 144 Mich. 341.

The respondent and intervener relied upon *Matter of Bayne*, 69 Misc. Rep. (N. Y.) 579. That was a case decided in the supreme court (not the court of appeals) of Kings county, New York, on application to review the action of the secretary of state in refusing to file a certificate of nomination of the nominee for the state senate by the regular democratic convention of the district. It was deposited in the mails in time to be received on the last legal day for filing but was actually received on the next day. Under the authority of an opinion by the court of appeals in *Matter of Application of Darling*, 189 N. Y. 570, involving a discretion committed to the courts by the election laws, the court granted the motion to require the certificate to be filed. The rule so announced by the court of appeals is as follows: "Though we regard the statutory requirement as to the time when certificates of nomination should be filed as mandatory, a majority of the court are of the opinion that there may occur accidents and mistakes, causing delay in such filing, from the effects of which the supreme court in either branch may, under section 56 of the election law, re-

lieve, provided it finds that the delay has not been due to the negligence or fault of the convention making the nomination, or of the party to whom the filing of the certificate was entrusted." So the highest court of the state regards the statute as mandatory save where certain discretion is permitted under their statutes.

As to executive construction or interpretation by the secretary of state and by his predecessors, it should be said that such construction or interpretation is not generally allowed, particularly in personal matters, nor where there can be found no obvious ambiguity. Here the statute is perfectly plain as to the upset time of filing. There was nothing to construe or interpret. Either the filing was in time or it was not. To hold otherwise is to allow the officer to legislate as to the time of filing. That is the office and function of the legislature. It has definitely expressed its will.

We think it may confidently be said that it seems to be a general rule of distinction running through the cases to this effect: That the time within which a thing positively stated by statute is required to be done by one who desires to be a candidate at a primary election is mandatory, while those things which are to be done by the voter and by the officials in charge of the election and the certification thereof are to be viewed and weighed with such liberality as is not inconsistent with the letter and spirit of the law and yet may arrive at the honest and true intent of the voter.

For the reasons given in this opinion, the applicant or relator is entitled to the relief granted. And the order directing the secretary of state to omit the name of George W. Norris of Broken Bow from the list of candidates for United States senator to be voted upon at the primary election August 12, 1930, was properly made.

STATE, EX REL. RICHARD F. WOOD, RELATOR, V. FRANK MARSH, SECRETARY OF STATE, RESPONDENT.

FILED SEPTEMBER 23, 1930. No. 27648.

1. **Elections: CANDIDATES: TIME FOR FILING APPLICATION.** Section 2114, Comp. St. 1922, as amended by section 1, ch. 108, Laws 1925, now known as section 32-1124, Comp. St. 1929, as to the requirement that the written application of a candidate for a general political office shall be filed in the proper office at least forty days prior to the primary, is mandatory.
2. ———: ———: ———: **CUSTOM.** No custom or practice adopted or followed by the officer with whom such primary applications are required by statute to be filed within a stated time can avail to extend such time.

Original proceeding by the State, on the relation of Richard F. Wood, against Frank Marsh, Secretary of State. *Decision in favor of relator.*

Richard F. Wood, pro se.

GOSS, C. J.

This is the second of a series of election cases arising on account of protested filings in the office of the secretary of state in relation to the primary election to be held August 12, 1930. This involves the filing of John Curtis of Omaha for the office of railway commissioner. The filing was not actually received and filed until after July 3, 1930, which was the last day allowed by the terms of the statute. The secretary of state allowed the filing and overruled a protest duly made against it, whereupon this special proceeding was brought by virtue of section 2119, Comp. St. 1922, as amended by section 3, ch. 108, Laws 1925, now known as section 32-1129, Comp. St. 1929. In the meantime the case of *State v. Marsh, ante*, p. 287, had been heard and decided by the writer of this opinion. So the secretary of state decided to reverse this judgment in this and all similar cases, but relator was unwilling to take chances on the applicant applying to a court even if such action should be taken by respondent. Thereupon the respondent defaulted and the relator made strict proof of the facts alleged. The

evidence shows that the filing was made too late under the statute and should not have been allowed.

The case is governed by the rules laid down in *State v. Marsh,* above referred to. At the conclusion of the hearing it was ordered that the respondent omit the name of John Curtis of Omaha from the certified list of candidates for railway commissioner. The order was proper.

STATE, EX REL. FRED JOHNSON, RELATOR, V. FRANK MARSH, SECRETARY OF STATE, RESPONDENT: FLOYD RYMAN, INTERVENER.

FILED SEPTEMBER 23, 1930. No. 27652.

Elections: CANDIDATES: EXCLUSION OF NAME FROM PRIMARY BALLOT. Upon a protest duly filed and heard by him, the secretary of state is justified in excluding from the list of candidates certified by him to be placed upon a political primary ballot the name of an applicant intentionally so devised and changed as to omit a portion of his real, true and full name, and to make it so like that of another and *bona fide* candidate for the same office as to confuse, and with the intention of confusing, the identity of the candidates.

Original proceeding by the State, on the relation of Fred Johnson, against Frank Marsh, Secretary of State, in which proceeding Floyd Ryman intervened. *Decision in favor of respondent.*

Sterling F. Mutz, for relator.

Charles E. Matson, for respondent.

O. B. Clark, for intervener.

GOSS, C. J.

This is a summary proceeding before a justice of the supreme court under section 2119, Comp. St. 1922, as amended by section 3, ch. 108, Laws 1925, and now known as section 32-1129, Comp. St. 1929. The relator, claiming to be Fred Johnson of Greeley county, on July 3, 1930, duly filed his application to be put upon the official republican

ballot as a candidate for the office of auditor of public accounts at the primary election to be held in this state August 12, 1930. That was in due time for such filing, being the last day therefor. On the morning of July 14, 1930, he signed a withdrawal of his application and it was given to one who filed it on July 15, 1930. In the meantime objections had been filed by Floyd Ryman and by Casper K. Blackburn to the placing of Fred Johnson's name upon the ballot. Also, by or on behalf of Fred Johnson, after his execution of the withdrawal on July 14 and before it was filed on July 15, notice was given to the office of the secretary of state that he wanted to withdraw his withdrawal. On a hearing the respondent refused to allow the withdrawal of the withdrawal and entered an order against the relator. At the hearing no evidence was received on the protests above referred to.

On the hearing before a justice of this court all the parties were represented by counsel. It was strongly urged that no applicant for a place on the party ballot at a primary election can, under the statutes as now existing, withdraw within less than 30 days prior to such election. The opinions of the various attorneys general of the state from 1907, when the general primary law was enacted, to the present have consistently held that such withdrawals may be made at any time before the lists are certified by the secretary of state. The statutes are rather confusing and I do not find it necessary to a decision of the case to decide that point here. It may be that this and other needed clarifications of the primary laws will be made by the legislature before this particular point must be considered and decided. There is another ground which is decisive of this contest.

The evidence on this hearing shows that the relator's real and true name is not Fred Johnson, but his first name is Arthur, and his real and true name is Arthur Fred Johnson or Arthur F. Johnson or A. Fred Johnson; that when, on July 3, 1930, he filed with the secretary of state his receipt for his filing fee, his affidavit and his application to have his name, therein represented to be Fred Johnson, placed upon the official ballot for the primary election as a

candidate for the office of auditor of public accounts, he was not intending to be a good faith candidate for said office but to confuse his name with that of Fred H. Johnson, a good faith candidate who had already filed for the same office and who is affiliated with the same party with which applicant or relator claims to be affiliated; and that to permit this to be done would be to sanction a patent fraud upon the respondent, upon a good faith candidate, and particularly upon the electors who are entitled under the law to have their identification of candidates unobscured by trickery and fraud. Under the law, the pleadings and the evidence, we have the power to exclude from the list of candidates one who has so falsely misrepresented his name in the circumstances here found. The fact that the secretary of state based his order of exclusion on the other ground does not vitiate his conclusion. His order was right even if the reasons he gave as a basis for it were wrong.

It may also be said that, in the proceeding here, we are not bound by nor limited to the evidence taken before the secretary of state. There, as we understand, the phases of the objections presented here relating to the deceptive elision of a part of relator's name and the facts learned when the withdrawal was offered were not permitted to be gone into because it was not deemed necessary by the secretary of state in the view he took of the matters relating to the withdrawal. These matters were competent here and are clearly decisive.

The judgment of the respondent was right in excluding the name of Fred Johnson of Greeley county from the list certified.

LINCOLN PACKING COMPANY ET AL., APPELLEES, V. MAUDE COE, APPELLANT.

FILED SEPTEMBER 23, 1930. No. 27452.

1. **Master and Servant: WORKMEN'S COMPENSATION PROCEEDINGS: APPEAL.** Where a motion for a new trial, alleging errors of law occurring at the trial, is interposed in a proceeding under the workmen's compensation act, the thirty days within which

an appeal shall be perfected from the district to the supreme court commences to run on the overruling of the motion.

2. Record examined and found not to disclose reversible error. Further, the proof amply sustains the judgment of the trial court.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

Sterling F. Mutz and *Edward C. Fisher,* for appellant.

Sanden, Anderson, Laughlin & Gradwohl, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

THOMPSON, J.

This is an action for compensation under what is known as our workmen's compensation act and amendments thereof. Comp. St. 1922, secs. 3024-3084. The commissioner found for the claimant. The employer submitted the matter to the district court, where, after hearing was had, judgment was entered on January 31, 1930, setting aside the award of the commissioner and dismissing the action. A motion for a new trial was filed February 1, 1930, overruled February 15, 1930, and on March 12, 1930, a transcript of the proceedings was filed in this court.

We are first met by a motion to dismiss the appeal for the reason that it was not "perfected within thirty days from the entry of the judgment." Whether or not this motion should be sustained depends upon the proper construction of the above law, and especially section 3062 thereof, in which it is provided, so far as here material: "Any appeal from such judgment shall be prosecuted in accordance with the general laws of the state regulating appeals and actions at law except that such appeal shall be perfected within thirty days from the entry of the judgment and the cause shall be advanced for hearing in the supreme court so as to bring said cause on for argument before such court within sixty days from the filing of the appeal and said supreme court shall render its judgment and opinion in such cases within thirty days after submission."

It is contended by the appellee that the 30 days commence to run from the date of the entry of the original judgment (in this case January 31, 1930), even though a motion for a new trial was filed the day following such entry and was not ruled on until 14 days thereafter.

In our view the 30 day period does not commence to run, where as in this case a motion for a new trial is filed in due time, until such motion is overruled. In this conclusion we find support in section 3062, Comp. St. 1922, as heretofore quoted, when such section is considered in connection with sections 8826 and 9138 of such statutes. In section 8826 it is provided: "The application for a new trial must be made at the term the verdict, report, or decision is rendered, and * * * shall be within three days after the verdict or decision was rendered, unless unavoidably prevented." Section 9138 provides in part: "The proceedings to obtain a reversal, vacation or modification of judgment and decrees rendered or final orders made by the district court * * * shall be by filing in the supreme court a transcript certified by the clerk of the district court, containing the judgment, decree or final order sought to be reversed, vacated or modified, within three months from the rendition of such judgment or decree or the making of such final order or within three months from the overruling of a motion for a new trial in said cause."

As we have held that an action to recover compensation under our statutes is one in equity, and so triable in the district court and in this court on appeal, it follows that the procedure announced in *Algermissen v. Crete Mills*, 118 Neb. 72, is controlling here, as in the *Algermissen* case we held: "Where a party to an equity action in the district court files a motion for a new trial alleging errors of law occurring at the trial, he has three months after the overruling of said motion within which to file a transcript on appeal to this court." Further, this holding was applied to a compensation case in *Baade v. Omaha Flour Mills Co.*, 118 Neb. 445, 448. It follows that the motion to dismiss should be, and is, overruled.

Considering the action on its merits, we find the history reflected by this record to be: Roy Coe, husband of appellant herein, was employed by the Lincoln Packing Company, appellee, and was on June 8, 1923, injured in the course of his employment. On August 14 following he filed his petition for compensation with the commissioner, who made an award of $15 a week on September 27, 1923. Thereafter Coe and his employer agreed on a lump sum settlement of $1,100, and on November 14, 1923, they jointly applied to the compensation commissioner to have such lump sum settlement approved, which was accordingly done on that day by the commissioner, and likewise on the same day was approved by the district court, with the proviso that when such $1,100 was paid to Coe the employer be discharged from further liability. The $1,100 was thereafter and on the same day paid to Coe. On June 10, 1924, such Coe died, and on June 9, 1925, his widow, claimant herein, on behalf of herself and their minor children, filed her petition with the commissioner for further award, and to have set aside such lump sum settlement. On August 14, 1925, the commissioner made an award in favor of Mrs. Coe of $15 a week from and after June 10, 1924, from which award the employer, appellee herein, appealed to the district court, where, after trial, and on January 31, 1930, the court entered decree finding that complete compensation had been made by the lump sum settlement above referred to, and ordered the application of Mrs. Coe, claimant, dismissed, as hereinbefore stated.

After a careful examination of the transcript and the bill of exceptions, we conclude that the record does not disclose reversible error, and that the judgment of the trial court is amply sustained by the evidence and should be, and is,

AFFIRMED.

EMMA LANE V. STATE OF NEBRASKA.

FILED SEPTEMBER 23, 1930. No. 27515.

1. **Constitutional Law.** The appellate court will not pronounce a statute unconstitutional and void where a determination of the

case does not require that the constitutionality of the statute be determined.

2. **Criminal Law**: STATUTES: VALIDITY. In this state all public offenses are statutory; no act is criminal unless the legislature has in express terms declared it to be so; and no person can be punished for any act or omission which is not made penal by the plain import of the written law.
3. ————: CONSTRUCTION. Criminal laws are to be strictly construed and a penalty must be imposed by clear words.
4. **Evidence** examined and *held* that the conviction in this case was wholly unsupported thereby.

ERROR to the district court for Douglas county: HERBERT RHOADES, JUDGE. *Reversed and dismissed.*

Baldrige, Dorsey & Baldrige, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Homer L. Kyle, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

EBERLY, J.

The record in this case discloses that Emma Lane, the defendant, was convicted in the district court for Douglas county on a complaint charging that she, "on or about the 31st day of July, A. D. 1929, in the county and state aforesaid, then and there being, did then and there practice barbering without a certificate of registration as a registered barber." Her motion for new trial was overruled, and from the sentence of the court she has appealed.

The material facts are stipulated, and it appears that the defendant for ten years last past has owned a beauty parlor and hair dressing establishment and followed the occupation of a cosmetologist in Omaha, Nebraska; that on the date alleged in the complaint she cut the hair of a young lady, one of the customers of the shop, without first obtaining a license under the barbers' act, as outlined in chapter 154, Laws 1929; that she had applied for and obtained a license under the cosmetologists' law, being chapter 156, Laws 1929, and as such was carrying on the practice of cosmetology on the date alleged in the com-

plaint; that Emma Lane, as well as all other hair dressing and beauty shop proprietors, earns her living by and under the trade and practice of cosmetology, which includes hair dressing and beauty culture, it being usual and customary to cut the hair of women and children as a necessary incident to this art or vocation.

The contentions of the defendant on this appeal are: First, that the part of the so-called barbers' law (chapter 163, Laws 1927, as amended by chapter 154, Laws 1929) compelling cosmetologists and beauty parlor operators to take out a license under the provisions of the barbers' act is unconstitutional and void; second, that there is a conflict between the barbers' law and chapter 156, Laws 1929, and that the latter, as the last legislative word, has superseded the provisions of the former; third, that the so-called barbers' law is unreasonable and goes beyond the realm of the police power of the legislature and therefore void.

The defendant has cited as to the constitutional questions involved the recent decision of *Banghart v. Walsh*, 339 Ill. 132. In this case the supreme court of Illinois, in a well-reasoned opinion construing the terms of the Illinois barbers' act denying beauty culturists the right to cut hair without a barber's license, held these provisions deny due process since the requirement is unreasonable. While the reasoning of the Illinois court is appealing, and the facts then under discussion and those here involved appear quite similar, if not identical, still it is thought the instant case is not to be determined on the principle announced in that case.

"The appellate court will not pronounce a statute unconstitutional and void where a determination of the case does not require that the constitutionality of the statute be determined." *Morse v. City of Omaha*, 67 Neb. 426; *War Finance Corporation v. Thornton*, 118 Neb. 797.

The question fundamentally involved in the present case is whether a cosmetologist, who has in good faith strictly complied with chapter 156, Laws 1929, approved April 23, 1929, entitled "An act to regulate and license practice and

teaching of cosmetology," etc., is required in addition to comply with the provisions of chapter 154, Laws 1929, entitled "An act to amend sections 1, 3, 4, 5, 6, 10, 10B., 16 and 17, chapter 163, Laws of Nebraska 1927, relative to the regulation of barbering," etc., approved April 22, 1929, and is subject to the penalties provided in the latter act for default or failure so to do.

Fundamentally, apart from statutory definition, a cosmetologist is not a barber simply because she may, as a necessary incident of her vocation, cut hair. A carpenter employs a plumb line, square and level, yet the common man would never think of defining the term "carpenter" as including and applicable to all who employ or use the plumb line, square and level in their respective trades.

In the case of *Keith v. State Barber Board,* 112 Kan. 834, the supreme court of Kansas had before it for construction an act entitled as one "creating a board of examiners to examine and license barbers; * * * providing for a license for barbers to practice their trade or calling, and providing punishment for a violation thereof." The first sentence of this Kansas act read: "It shall be unlawful for any person to follow the occupation of a barber in this state unless he shall have first obtained a certificate of registration, as provided in this act." The court said: "It contains no definition of the word 'barber.' It requires an applicant for such a certificate to show among other things that he is free from contagious or infectious disease and that he has the skill to properly perform all the duties of a barber, 'including his ability in shaving, hair-cutting, preparation of tools, and all duties and services incident thereto.' The trial court found upon sufficient evidence that the plaintiff in her beauty parlor shop had been doing all of these different kinds of work which barbers in general do: Cutting hair, massaging the face, clipping hair with barber clippers, singeing the hair, giving tonics, shampooing, manicuring; that these activities were not merely incidental but were important features of the business, coordinating with other parts of it." It was held, however, that "The proprietor of a 'hair-dressing and

beauty parlor,' the important features of whose business include cutting hair, massaging, clipping hair with barber clippers, singeing the hair, giving tonics, shampooing and manicuring, but not shaving the face, is not a barber within the meaning of that word as used in a statute subjecting the followers of that occupation to examination and regulation."

"In this state all public offenses are statutory; no act is criminal unless the legislature has in express terms declared it to be so; and no person can be punished for any act or omission which is not made penal by the plain import of the written law." *State v. De Wolfe*, 67 Neb. 321; *State v. Pielsticker*, 118 Neb. 419.

So, too, in construing or interpreting provisions of criminal law it is to be remembered that if any doubts of the meaning exist in penal laws they ought to be construed in favor of the accused. While in no manner negativing the necessity of reasonable construction, yet as between the government and the individual the benefit of the doubt, all other reasons being equal, ought in these cases to be given to the individual, not to authority; for the state makes the laws and authority has the power. Criminal laws are to be strictly construed, and a penalty must be imposed by clear words.

This penalty the state avers is to be found in provisions of chapter 163, Laws 1927, as amended by chapter 154, Laws 1929, hereafter referred to as the "barbers' act." But the only penalties subject to the limitations above suggested, enforced under the terms of the barbers' act, are to be found in section 9, ch. 154, Laws 1929, and of these the only penalties not necessarily excluded by the nature of the transaction here presented for determination are the following: "17. Each of the following constitutes a misdemeanor, punishable upon conviction by a fine of not less than $5, nor more than $50: 1. The violation of any of the provisions of section 1 of this act."

Section 1 of chapter 154, Laws 1929, reenacted without change the first and second paragraphs of section 1, ch. 163, Laws 1927. The first paragraph, thus continued, pro-

vides: "After January 1, 1928, no person shall practice or attempt to practice barbering without a certificate of registration as a registered barber issued pursuant to the provisions of this act, by the secretary of the state department of public welfare." The second paragraph of section 1 referred to related to apprentice barbers. The third, and last, paragraph of section 1 is wholly inapplicable to the facts now before us for consideration. In addition it is also to be noted that section 3, ch. 163, Laws 1927, before the amendment of 1929, expressly provided: "Nothing in this act shall be construed to interfere with the cutting of hair of women and children by lady cosmetologists." And section 9, ch. 163, which was in no manner affected by any of the amendments of 1929 and continues in full force and effect, contains the provision: "Whenever the provisions of this act have been complied with, the department of public welfare shall issue a certificate of registration as a registered barber or as a registered apprentice."

However, among other changes affected by the amendment of 1929 to the barbers' act was the elimination of the words "persons engaged in beauty culture" and all references whatever to "lady cosmetologists" theretofore appearing in section 3 of the act of 1927. In lieu of these, the amendment of 1929 to the barbers' act substituted as persons exempt from its provisions "while in the proper discharge of their professional or occupational duties: * * * 4. Persons engaged in operating or employed in beauty shops or hair-dressing parlors patronized by women and children, except as to the cutting of hair: Provided, however," etc. This enactment, which in form suggests a proviso engrafted on an exception, then proceeded in terms to prohibit any person from following "the occupation of cutting hair or practicing as a hair-cutter" without first complying with the provisions specifically set forth therein, including the prescribed qualifications required, the method and means of determining the same, and the issuing of a "hair-cutter's certificate" which "shall authorize the cutting of hair of persons in beauty shops

and hair-cutting establishments," and the manner in which such certificate shall be renewed annually. It also specifically provided that "any person who shall have been engaged in the cutting of hair in any beauty shop prior to taking effect of this act shall be granted a certificate of registration as a hair-cutter, without examination, by making application to the secretary of the department of public welfare on or before July 1, 1929, and paying the required fee of $3 on applications prepared and furnished by the board of barber examiners."

It is to be noted, however, that section 3 above referred to prescribed within itself no penalty for failure to conform to its requirements, and if penalties exist for such they must be sought elsewhere in the provisions of the barbers' act, as amended. However, the express provisions just referred to, including all portions of the barbers' act, as amended, which are specifically referred to in terms in section 3 aforesaid, fairly disclose a legislative intent that section 3 of the barbers' act, as amended, shall constitute a full, complete and exclusive regulation of all the matters covered therein. We take this to be true, notwithstanding that the form of the enactment under consideration is suggestive of "a proviso engrafted on an exception," because if it be deemed a proviso in form the substance embraced in this enactment causes it fairly to fall within the following rule: "The appropriate office of the proviso is to restrain or modify the enacting clause, and not to enlarge it; but where from the language employed it is apparent that the legislature intended a more comprehensive meaning, it must be construed to enlarge the scope of the act, or to assume the function of an independent enactment." 36 Cyc. 1162. See *Radil v. Morris & Co.*, 103 Neb. 84.

The natural conclusion follows that the amendment of 1929 to section 3, ch. 163, Laws 1927, which we refer to as the barbers' act, constitutes an independent enactment, exclusive in its nature, for the government and regulation of the subject to which it applies. From this it would follow that neither the "hair-cutter and hair-dresser," which

this section defines and regulates, is a "barber" as defined by the barbers' act; that the occupation regulated is not "barbering;" nor is the certificate issued, which this section directs to be made under the name of "hair-cutter's" "certificate of registration," to be deemed either the legal equivalent of or as a fact "a certificate of registration as a registered barber" referred to in section 1 of the barbers' act, and the issuance of which is provided by section 9 of the same act. The stipulated facts disclose that the transaction upon which this prosecution is based is one properly and wholly within the purview of, governed and controlled by section 3, ch. 163, Laws 1927, as amended. Section 1 of this act, and the penalties provided for violation thereof, being expressly limited by the language employed to "barbering without a certificate of registration as a registered barber," the transaction disclosed by the stipulation is not within the description set forth in the complaint upon which conviction was had in the instant case and the facts involved wholly fail to sustain the same. It is also to be noted that the only penalty provided for the offense charged in the complaint is expressly limited to "violation of any of the provisions of section 1 of this act." The legislature has wholly failed to provide penalties for the violation of the provisions of section 3 of this act, as amended.

In view of the canons of construction heretofore set out, we may not by judicial construction ignore specific limitations or extend the scope of the penalty provided in the barbers' act beyond the express words in which they are prescribed. The conclusion is that there are no penalties provided in chapter 163, Laws 1927, as amended, for the violation of any of the provision of section 3 of the barbers' act. Therefore none can be applied or enforced by the state.

The stipulation also discloses that the defendant has, so far as we are advised, fully complied with the provisions of chapter 156, Laws 1929.

It follows that the stipulated facts wholly fail to sustain the conviction had herein, but disclose affirmatively that the defendant has, so far as we are advised, substantially

complied with all the terms of the controlling enactment. *White v. Blum*, 4 Neb. 555; *State v. Maccuaig*, 8 Neb. 215; *State v. Insurance Co. of North America*, 71 Neb. 320.

The judgment appealed from is accordingly reversed and the cause dismissed.

REVERSED AND DISMISSED.

LEROY CHILDS V. STATE OF NEBRASKA.

FILED OCTOBER 10, 1930. No. 27369.

1. **Criminal Law**: MISCONDUCT OF COUNSEL. Where, in the trial of a homicide case, one of the counsel for the prosecution in the course of the trial made this remark to the jury, namely, "Since when has the law sanctioned killing for the collection of a bill for room rent?" *held*, that the remark is grossly incompetent, not pertinent to the issues involved, and entirely aside from the record and should not have been made.
2. ———: WEIGHT OF EVIDENCE: QUESTION FOR JURY. It is elementary that it is the duty of the jury to judge of the weight of the evidence, and it is within its province to pass upon the entire case and upon all of the competent evidence.
3. **Homicide**: ELEMENTS: PROOF. "A purpose to kill and malice are material elements of murder in the second degree and, under a charge therefor, both must be proved beyond a reasonable doubt." *Whitehead v. State*, 115 Neb. 143.
4. **Evidence** examined, and *held* insufficient to sustain a conviction of murder in the second degree.

ERROR to the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Reversed.*

C. E. Walsh and *R. C. Meissner*, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Clifford L. Rein, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and LESLIE, District Judge.

DEAN, J.

October 21, 1929, Leroy Childs was informed against in the district court for Douglas county and there charged

with having, on about September 23, 1929, "unlawfully, maliciously, feloniously, and purposely, but without premeditation and deliberation, shot Albert Samples with a revolver and as a result thereof, he died on the 5th day of October, 1929; defendant thus committed murder in the second degree." The jury found the defendant guilty of murder in the second degree, as charged in the information. Thereupon the court imposed a sentence of fourteen years in the penitentiary upon the defendant. The defendant prosecutes error and prays to have the judgment reversed.

At, and for some time before the tragedy, the defendant's mother conducted a hotel in Omaha where Samples at one time roomed and boarded. On or about the evening of September 22, 1929, Samples and the defendant, with several others, were visiting at a place across the street from the Childs home and remained there until about 1:30 in the morning. At about this hour, the entire company remaining outside, the defendant entered his mother's home to get the key to her car to the end that he and his friends might go out for a drive. His mother, however, upon being informed of their plans, remarked that if Samples "has money enough to cabaret with, he has enough to pay me part of my room rent."

From the defendant's evidence it appears that his mother came out to the car as they were about to drive away on the evening in question and that, upon seeing Samples seated in the car, she asked him to settle for certain past-due room rent which she reminded him was unpaid. Thereupon she went upstairs, accompanied by Samples, ostensibly to examine an account book in the matter of the alleged room rent indebtedness, and in a few minutes the defendant followed them. However, on the defendant's appearance, Samples at once accused him of having returned to his mother's home, not for the car key as he had represented, but to inform his mother that he, Samples, had some money; and this to the end that she might collect certain unpaid room rent which she said Samples owed her. About this time Samples started down the stairway, but, according to the defendant's evidence, he turned back, and the de-

fendant testified that he observed that he had his hand on his hip. The defendant further testified that Samples then knocked his mother down and that he, the defendant, ran into a bedroom. Upon seeing a revolver on the dresser, he grabbed it and, reentering the room where Samples and his mother were, he discharged the gun into the floor. In the scuffle that immediately followed between them, the gun was accidentally discharged and Samples was thereby fatally wounded. The defendant averred that the gun in question belonged to his mother and that it was presented to her by his father for her protection. And from the evidence it appears that the defendant called the police immediately after the shooting.

In respect of the facts pertaining to the altercation, from his viewpoint, Samples made a statement at the hospital the day after he was shot wherein he said that he owed the defendant's mother for room rent. And he said that, on the evening in question, he turned to go down the stairs at her home and the defendant jumped up and began to shoot at him and that he continued shooting after he had fallen to the floor. Samples also said that there had never before been any trouble or disturbance of any nature between them and that they "were like brothers," nor had the defendant ever made any threats against him. In his statement, Samples testified that defendant's mother was between them and that he, Samples, "was trying to run around him to grab him to keep him from shooting me. I didn't want to hurt him. I believe I am a better man than him and I wanted to take the pistol away from him."

In respect of the wounds upon the body of the deceased, a physician testified that there was "a bullet wound in the left side and a bullet wound in the right side—well, I didn't know whether the wound was made by one bullet going straight through, or two bullets; one bullet wound in the left hip, and one in the right leg." This physician also testified that Samples died October 6 or 7 of traumatic pneumonia, induced by the wounds on his body, about two weeks after the shooting.

Section 9545, Comp. St. 1922, defines and fixes the punishment for murder in the second degree in the following language, namely:

"Whoever shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree; and on conviction thereof, shall be imprisoned in the penitentiary not less than ten years, or during life."

We do not think the evidence warrants a verdict of second degree murder. The record does not disclose evidence of malice on the part of the defendant toward the deceased, nor is there evidence showing purpose on the part of the defendant in shooting Samples. Samples testified in his statement at the hospital, as noted above, that he and the defendant had always been on friendly terms and that at no time did the defendant address any threatening language to him. Evidence that defendant was attempting to aid Samples after the shooting, and before the police arrived, was not permitted to be presented to the jury. We have held:

"A purpose to kill and malice are material elements of murder in the second degree and, under a charge therefor, both must be proved beyond a reasonable doubt." *Whitehead v. State,* 115 Neb. 143.

The defendant complains because the court refused, upon request, to instruct the jury on the question of self-defense, and also in that the court refused to allow a doctor, conversant with her condition, to testify in respect of the effect upon the defendant's mother when she fell from the blow of Samples' fist when he knocked her down. In view of the record, we think the court erred in excluding such evidence. Where the evidence conflicts, it is elementary that it is the duty of the jury to judge of the weight of the evidence, and it is within the province of the jury, of course, to pass upon the entire case and upon all of the competent evidence submitted to that body.

Counsel for the defense also complain of certain remarks made by the prosecuting attorney in his argument to the jury. One remark of which complaint is made fol-

lows: "Since when has the law sanctioned killing for the collection of a bill for room rent?" Clearly the remark is not pertinent to the issue and is entirely aside from the record and should not have been made. But, inasmuch as the action must be reversed for a new trial, we do not find it necessary to pursue this feature of the record further except to say that it does not meet with our approval.

The judgment must be and it hereby is reversed and the cause is remanded for further proceedings not inconsistent with the views herein expressed.

REVERSED.

JOHN D. LIVANIS, APPELLANT, V. NORTHPORT IRRIGATION DISTRICT, APPELLEE.

FILED OCTOBER 10, 1930. No. 27067.

1. **Pleading.** "A plaintiff must recover, if at all, on the cause of action stated in his petition. It is not the province of a reply to introduce new causes of action." *Wigton v. Smith*, 46 Neb. 461.
2. Pleadings examined and found to sustain the trial court in entering judgment thereon.

APPEAL from the district court for Morrill county: EDWARD F. CARTER, JUDGE, *Affirmed.*

T. F. Neighbors, Coulter & Atkins and *Morrow & Morrow*, for appellant.

R. O. Canaday, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

DAY, J.

This is an action to recover damages for injury to crops caused by seepage water, resulting from the operation of the defendant's irrigation works, including the application of water to plaintiff's land by lease, and other lands within the district. From a judgment on the pleadings in favor of defendant, plaintiff appeals.

The defendant attempted to prosecute a cross-appeal to reverse the order of the district court in vacating the judgment first entered in this case. It was entered on March 17, 1926. It was vacated by the court after a hearing, July 2, 1928. The only assignment of error to this proceeding is, quoting from defendant's brief: "The cross-appellant insists that this setting aside of this judgment is not sustained by the evidence." This court has heretofore on November 18, 1929, entered an order quashing and striking from the files the bill of exceptions relative to this phase of the case. The evidence upon which the trial court entered the order is therefore not before the court. In that state of the record, it will be presumed that there was sufficient evidence to sustain the finding of the trial court. Subsequent to the vacation of the first judgment, the trial court, upon a reconsideration of the case, sustained the motion for a judgment upon the pleadings, from which judgment the plaintiff now appeals.

This action was brought by plaintiff to recover damages to his beet crop, which he alleges was destroyed by seepage in 1924. The plaintiff was a tenant upon land within the irrigation district upon which this crop was grown. He seeks to recover his loss upon two theories exemplified in two causes of action. In his first cause of action, he alleges that the defendant, an irrigation district, "operated an irrigation canal by means of which it diverted * * * large quantities of water from the North Platte river," and that "large quantities of water escaped and percolated from said canal through the sides and bottom thereof," and seeped the land on which his crop was growing, thereby causing his damage.

The second cause of action, in addition to the facts stated in the first cause of action, alleges that the damage was the result of certain acts of negligence on the part of the defendant in the construction and operation of the irrigation works.

The defendant filed an answer to the petition of the plaintiff, in which, *inter alia*, it alleges that the irrigation system was constructed, operated and maintained by the

United States of America under the act of congress of June 17, 1902, known as the "Reclamation Law" and acts amendatory thereof and supplemental thereto; that said system is known as the Northport division of the North Platte project, and that said land is within the Northport division and was irrigated from the irrigation system of said Northport division of the North Platte project; that said irrigation works were constructed, operated and maintained by the employees of the department of the interior of the United States government, and that this defendant has no supervision over the construction of said irrigation system or over the operation and maintenance of the same; that said construction, operation and maintenance are paid for by money appropriated by the congress of the United States from the reclamation fund of the United States for that purpose, and that the only function of the district is to levy and collect taxes from the individual water users to reimburse said reclamation fund.

The plaintiff then filed a reply in which he admits that the United States constructed the irrigation works, and sets out the contract of the Northport Irrigation District with the United States, and alleges that the irrigation works were constructed by the United States of America under and by virtue of said contract and have since the construction thereof been operated under said contract.

A motion for judgment on the pleadings was based upon two grounds: (1) That the petition did not state a cause of action; (2) that the petition and reply admit facts constituting a bar to recovery.

The ruling of the court does not state the grounds upon which the motion was sustained. Numerous reasons are argued *pro* and *con* by counsel. However, it appears that the plaintiff alleges a cause of action based upon the assumption that the defendant herein constructed and operated the irrigation works; while in his reply the plaintiff admits that said canal was constructed and operated by the United States under the reclamation service. The reply, after such admission, seeks to establish a contractual liability on the part of the defendant by virtue of a contract

entered into between it and the United States. The pleadings establish the fact that the damage alleged occurred during the time the defendant was not operating or maintaining said works, but was only acting as fiscal agent of the United States with reference to the irrigation project. The petition alleges that the district is liable for damage from the operation of the canal. Then, in the reply, the contract between the district and United States is pleaded. It is urged that the United States was the agent of or contractor for the district. It is urged that the district by virtue of this contract secured the United States to build the works and is therefore liable. These contentions introduce new causes of action. "A plaintiff must recover, if at all, on the cause of action stated in his petition. It is not the province of a reply to introduce new causes of action." *Wigton v. Smith*, 46 Neb. 461. See *Hastings School District v. Caldwell, Hamilton & Co.*, 16 Neb. 68; *Savage v. Aiken*, 21 Neb. 605; *Hallner v. Union Transfer Co.*, 79 Neb. 215.

In the instant case, the petition, contradicted by the admission in the reply and not being aided by the new allegations therein, required the judgment of the trial court. The judgment is accordingly

AFFIRMED.

ROSE and GOOD, JJ., dissent.

S. M. CRISWELL, APPELLEE, V. FLORA BELLE MCKNIGHT ET AL., APPELLEES: SECURITY STATE BANK, INTERVENER, APPELLANT.

FILED OCTOBER 10, 1930. No. 27041.

1. **Mortgages**: DISCHARGE: RECOVERY OF TAXES. Abundant means have been provided to protect the rights of mortgagees in relation to taxes against their incumbered property, but when one fails to avail itself of such means it should ask no more. If it enters a satisfaction in full of its mortgage and thus discharges such mortgage lien, equity cannot permit recovery of taxes paid when set up in an entirely different action.
2. **Subrogation.** Subrogation is a mode of compelling the ultimate discharge of a debt by one who should pay it. It includes every

instance in which one pays a debt for which another is primarily answerable and which in equity and good conscience should have been discharged by the latter. But where there is no mistake of fact and where the rights of those seeking it have no greater equity than those opposing it, subrogation will not be allowed.

APPEAL from the district court for Custer county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

Sullivan & Wilson, for appellant.

N. T. Gadd and *Schaper & Runyan, contra.*

T. B. Dysart, amicus curiæ.

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and PAINE, District Judge.

PAINE, District Judge.

In an action to foreclose a tax certificate, the intervener bank, appellant herein, filed its amended petition of intervention asking that it be allowed to recover a portion of the taxes which had been paid and redeemed by it some two years prior upon that portion of the land included in the said tax certificate upon which it had already secured a decree of foreclosure on its mortgage at the time of such payment. It asked to be subrogated to the rights of the holder of the tax certificate against the remaindermen to the amount paid by it. The lower court denied the prayer of the intervener and dismissed its amended petition. Intervener appeals.

It will be quite evident, from the involved nature of the transactions between the parties, that a concise statement of the case, including some of the dates, is absolutely necessary for a clear understanding of the legal questions involved.

Two suits were brought in the district court for Custer county prior to the case at bar, and which will be briefly set out as preliminary to the main case.

The plaintiff, S. M. Criswell, appellee herein, began an equity action to foreclose a tax sale certificate against 520 acres of rough and rather unproductive land near Berwyn

in Custer county, originally owned by William McKnight, who died testate, and under his will he had given only a life estate in the above real estate to his widow, Flora Belle McKnight, with the remainder to his nine children, three of whom were Forest McKnight, Virgil McKnight, and Ira D. McKnight. The said Ira D. McKnight, one of the remaindermen, originally purchased the said tax sale certificate upon March 24, 1924, in the amount of $1,093.65, with subsequent taxes of $544.11, upon his mother's failure to pay the taxes. Upon April 25, 1925, he sold and assigned said certificate to the plaintiff, S. M. Criswell, of Glenwood, Iowa.

In his action, S. M. Criswell, plaintiff, made the Security State Bank of Broken Bow, mortgagee of a portion of the land, a party defendant, and the said bank appeared and filed a motion and a demurrer, which raised the question that the action to foreclose had been prematurely brought, and it was therefore dismissed by the plaintiff, S. M. Criswell, without prejudice.

Upon January 17, 1925, the Security State Bank of Broken Bow, the intervener in this case, filed its petition to foreclose a mortgage given by Flora Belle McKnight upon her life estate, and by two heirs, Forest and Virgil McKnight, upon their two-ninths interest therein, the owners of the other seven-ninths not being parties to the mortgage or interested therein. The loan was for $2,140. The land covered by the mortgage was the northeast quarter of section 33, township 16, range 19.

Upon October 12, 1922, Glen O. Perkins, to secure the payment of a loan of $4,307.20, took a mortgage from the same three grantors upon the entire tract of 520 acres owned by William McKnight at the time of his death, this mortgage being a second mortgage as to the northeast quarter of section 33, but being a first mortgage upon the remaining 360 acres in so far as the life estate of the widow and the one-ninth interest of each of said two sons was concerned. Perkins filed an answer and cross-petition to foreclose his mortgage. The bank had its decree of foreclosure entered May 8, 1925, in the amount of $1,481.44, a stay was taken and expired, order of sale issued and sale had, which was set aside.

On November 1, 1926, a second sale was had, at which sale the bank bid, but said Perkins was the highest bidder. On November 24, 1926, the sale was confirmed on motion of the bank and a deed ordered to the purchaser, who was the said Glen O. Perkins, who bid $1,925 for the 160 acres, and out of this the Security State Bank upon application of its attorneys received on its mortgage $1,726.09, being the full sum due thereon, and accepted the same in full settlement, and the surplus of $199.81 still remains in the hands of the clerk of the district court for Custer county.

The said Glen O. Perkins, by purchasing at the sheriff's sale, under the foreclosure of the Security State Bank, the northeast quarter of section 33, and under the decree on his cross-petition the other 360 acres, became the owner in the entire 520 acres of the life estate of Flora Belle McKnight and of the two-ninths interest of two remaindermen. After the confirmation of this sheriff's sale upon its mortgage, the bank by its president upon January 27, 1927, canceled its mortgage of record, acknowledging receipt in full of the money loaned.

Upon July 21, 1927, the said S. M. Criswell, assignee, began a second suit to foreclose his tax sale certificate, being the case at bar, and upon September 23, 1927, filed his amended and supplemental petition therein, in which second action he omitted the Security State Bank as a party defendant for the reason that at that time the northeast quarter of section 33, upon which the Security State Bank had held a mortgage, was not involved, as the bank upon May 22, 1926, had redeemed that portion of the land from the tax sale certificate by paying the county treasurer the full amount of taxes due upon said northeast quarter of section 33 and received his receipt therefor, and the only land left involved in the foreclosure suit on the tax sale certificate was the 360 acres.

Upon October 24, 1927, the Security State Bank was permitted to file a petition of intervention in the tax sale certificate foreclosure, and upon May 2, 1928, filed an amended petition of intervention seeking to recover the taxes which it had paid and redeemed upon May 22, 1926, upon the 160

acres upon which it had held a mortgage, and alleged, among other things: "Intervener made said payment intending that it would have a lien under the terms of its said mortgage * * * with interest at eight per cent, * * * that it, this intervener, became the equitable assignee of an interest in said tax sale certificate."

In the answer to this amended petition of intervention it is alleged that said bank stood by and permitted the northeast quarter of section 33, upon which it had a tax lien, to be sold on its own decree of foreclosure and such sale confirmed, and it is thereby estopped from making any claim in this case in which the northeast quarter of section 33 is in no wise involved, and that the petition in intervention should be dismissed.

It is not clear to the court against which one of the parties the intervener expected, by its evidence, to prove a right of subrogation.

Fraud is alleged by intervener on the part of Ira D. McKnight and S. M. Criswell, but the evidence entirely fails to sustain such charge.

In this case the intervener through its president claims that Glen O. Perkins, bidder at the sale, orally agreed to pay the bank these taxes after he had received his sheriff's deed, but the testimony falls short of sustaining this contention, for Mr. Wilson, the president of the bank, the last time he was on the stand, indicated that Perkins gave no definite promise, and Perkins denies it positively. Mr. Wilson testified that he paid off the taxes on the 160 acres of land he had foreclosed to protect his mortgage lien, as well as to avoid the high interest of the tax certificate. After such payment the sale occurred under the bank's decree, the first sale bringing more than the second, and a small deficit would have occurred if the surplus had been claimed by the bank to apply on the taxes, but the bank has never claimed the surplus from the second sale to reduce its loss, and seeks by intervening in this separate action to recover in part from some one the entire amount advanced by it on taxes on the land under its mortgage.

1. The intervener bank knew that a tax certificate had been outstanding against the property upon which it held its mortgage, because it compelled the dismissal of the first suit brought to foreclose it. The bank could have been assigned the tax certificate or become an equitable owner therein of the part assessed against the land upon which it held a mortgage. *Leavitt v. Bell,* 55 Neb. 57. But the bank could also redeem and cancel such taxes, which latter course it followed. These taxes thereupon became a part of its mortgage debt with rate of interest provided therein. Although its mortgage had proceeded to decree, yet, as its only right to pay the taxes was by reason of this mortgage, equity might have protected it in a supplemental decree or upon proper application have permitted the surplus to be used to refund the bank its taxes, but the burden of bidding the property high enough to guarantee that such surplus would be adequate was upon the bank, which ceased bidding when the surplus was only about $200 and not sufficient to protect it from loss in its payment of taxes. Dysart, Foreclosures in Nebraska (1929) sec. 38; *Kersenbrock v. Muff,* 29 Neb. 530; *Johnson v. Payne,* 11 Neb. 269.

In the leading case of *Young v. Brand,* 15 Neb. 601, this court held:

"The purchaser under a decree of foreclosure of a mortgage obtains the title of all the parties to the suit whether their title be that which is set forth in the pleadings or not."

In the case at bar the appellees argue that the bank parted with the interest it acquired after the decree was entered on its mortgage through the sale and sheriff's deed as effectively as if it had redeemed these taxes prior to filing its petition in foreclosure and set them out fully in such petition, making the amount of the decree include such taxes.

Appellant claims the case of *Young v. Brand, supra,* was decided on the doctrine of *res judicata,* as Roos had purchased the real estate at tax sale August 13, 1877, which ripened into a tax deed after Roos had foreclosed his mortgage without disclosing his possession of a tax certificate on the same property. The court say:

"During all this time the plaintiff's grantor held this lien on the mortgaged property, which could have been joined in that action, but no mention is made of it. It is now too late. The deed is an 'entire bar' against him, and consequently against those claiming under him."

From this statement from the text is based the syllabus therein reading as follows:

"The mortgagee of real estate cannot purchase the mortgaged premises at tax sale prior to the foreclosure by him and after foreclosure take a tax deed and compel the purchaser at foreclosure sale to redeem. The tax lien if foreclosed at all must be foreclosed with the mortgage."

"The purchaser of real estate at judicial sale under the foreclosure of a mortgage buys at his peril, but he acquires all of the interest of the mortgagor and the mortgagee in the mortgaged premises. He acquires that interest as effectually as he would have done by deed from the parties, and he may protect himself under their rights." *Bannard v. Duncan,* 79 Neb. 189.

"A foreclosure sale of lands and tenements, unless the decree otherwise provides, transfers to the purchaser every right and interest in the property of all the parties to the action. *Hart v. Beardsley,* 67 Neb. 145." *Arterburn v. Beard,* 86 Neb. 733.

Abundant means to protect the rights of mortgagees against taxes are provided, but when one fails to avail itself of such means it should ask no more. Its only right to pay these taxes was given in its mortgage, and in *Hitchcock v. Merrick,* 18 Wis. 375, it was held that taxes paid after its decree had been entered could not be recovered by mortgagee, but Nebraska courts have been more liberal and allow relief until the satisfaction of the mortgage is entered. *Johnson v. Payne,* 11 Neb. 269. After that time there is no mortgage lien, and the mortgagee having failed to protect itself when ample means were provided may meet a loss if the surplus is insufficient.

2. As between the life tenant and the owner of the fee it is the duty of the former to pay all taxes. *King v. Boettcher,* 96 Neb. 319. And if the life tenant had bought in such

taxes it would have been considered simply a redemption on her part. *Crawford v. Meis*, 123 Ia. 610.

Appellant demands relief under the right of subrogation. But will such relief cause the taxes to be paid by the life tenant primarily responsible therefor? No. Will the relief if permitted require the payment to be made by the mortgagors? No; not as mortgagors, for the mortgage was absolutely released by the bank.

It is the rule in this state that: "A court of equity will apply the doctrine of subrogation where to refrain from so doing would permit a person who has received the benefit of money paid under a mistake of fact, which discharged a lien upon real estate, to retain such benefit under such circumstances that equity and good conscience dictate its repayment or the preservation of the lien." *Lee v. Newell*, 96 Neb. 209. In that case an agent without authority from his principal, who resided in South Dakota, paid and satisfied the delinquent taxes against land instead of purchasing a tax sale certificate thereon so that the principal might secure title thereto if it was not redeemed. This was clearly a mistake of fact, as the agent thought his principal already had title to the land and equity rightly granted relief prayed. But in the case on trial there was no mistake of fact proved as to any material matter involved.

The doctrine of subrogation may have its source in the Roman law, but the term itself is borrowed from the civil law. It is a creature of courts of equity and includes every instance in which one pays a debt for which another is primarily answerable, and which in equity and good conscience should have been discharged by the latter. Yet this doctrine will never be applied where innocent persons will be injured. 25 R. C. L. 1313, 1322; *Gerseta Corporation v. Equitable Trust Co.*, 241 N. Y. 418, 43 A. L. R. 1320. But, while subrogation is a mode of compelling the ultimate discharge of a debt by the one who in good conscience ought to pay it, yet the rights of one seeking subrogation must have greater equity than the rights of those opposing it. *Western Surety Co. v. Walter*, 44 S. Dak. 112, 24 A. L. R. 1519.

This court has held that subrogation will be enforced to subserve the ends of justice, but will not be applied when it will wrong an innocent party, and where the one invoking it has been grossly negligent. *Hayden v. Huff*, 60 Neb. 625. This case is cited to show the limits of the doctrine, and not to imply that gross negligence is attributable to the bank in this case.

If a supplemental decree had been entered in the foreclosure suit for the amount due the bank upon the taxes it had paid, then if it did not care to bid high enough to cover the amount of its decree, a deficiency judgment could have been secured against the mortgagors, but the bank failed to avail itself of this benefit.

Other propositions are argued at length in the excellent briefs submitted, but to consider them would unduly lengthen this opinion.

The district court had the benefit of seeing and hearing the witnesses testify and, after the trial, briefs were submitted, which the trial court considered in arriving at his finding. The former opinion herein is withdrawn and the motion for rehearing thereon denied. The judgment of the lower court is right and is

AFFIRMED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. DUNBAR STATE BANK ET AL., APPELLANTS: HENRY G. SEYFER ET AL., INTERVENERS, APPELLEES.

FILED OCTOBER 17, 1930. No. 26943.

1. **Banks and Banking: GUARANTY FUND: DEPOSIT: PROCEEDS OF FORGED NOTES.** Proceeds of forged notes indorsed by the payee and by him knowingly and fraudulently uttered and negotiated may become a deposit in the ordinary course in the bank operated and controlled by said payee and so treated in a suit in equity by the parties defrauded that they become a charge upon the guaranty fund.
2. *State v. Brown County Bank*, 112 Neb. 642, and *United States Nat. Bank v. Dunbar State Bank*, 118 Neb. 624, followed.

APPEAL from the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

C. M. Skiles, Albert S. Johnston and *I. D. Beynon,* for appellants.

Pitzer & Tyler, D. W. Livingston, Congdon, Finlayson & Burke and *Bertrand V. Tibbels, contra.*

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

PER CURIAM.

This is an action to establish the two claims of Seyfer et al. and the First National Bank for deposits in the now defunct Dunbar State Bank, payable from the state guaranty fund. It is now before the court on rehearing. The court formerly adopted an opinion in this case, reported in 230 N. W. 99, which opinion it now withdraws. There is no dispute as to the material facts in this case. The record establishes the following situation: The Dunbar State Bank was taken over by the guaranty fund commission April 4, 1927. It was a "one man" bank with one Murray as president and only active officer directing and controlling its affairs until he departed for parts unknown in March, 1927. While Murray was thus operating this bank and exercising sole control over its affairs, he discounted at other banks three forged notes for $5,000 each, two of which are involved in this controversy, and one of which was involved in *United States Nat. Bank v. Dunbar State Bank,* 118 Neb. 624. These transactions followed the established course of business and in the same manner legitimate transactions had been handled by the bank for many years. One of these notes was discounted by the Merchants National Bank of Nebraska City, the other by the First National Bank of Omaha. The proceeds of each note were credited to the Dunbar State Bank, which credits were exhausted by drafts drawn thereon by the Dunbar State Bank in the usual course of its banking business. Seyfer et al., who were directors of the Dunbar State Bank, paid the Merchants National Bank of Nebraska City the amount due on the note it dis-

counted pursuant to an agreement of guaranty and prosecuted this claim. Their claim was consolidated for trial with the claim of the First National Bank of Omaha. The transactions are identical as related to the Dunbar State Bank. At a time approximately that of the discount of these notes, Murray, in order to balance the books of the bank, opened two checking accounts, one in the name of "Thomas B. Murray, Special," and the other, "Thomas B. Murray, Trustee." Deposits were indicated equal to the amount of the discounts of these two notes. There is no question but that as a result of these transactions money or its equivalent was received by the Dunbar State Bank. These claims were presented to the trial court as constituting valid deposits for which the guaranty fund is liable and by the court allowed as such.

As preliminary to the discussion of this case, it is to be remembered that, prior to the adoption of the present state banking act, which now appears as sections 7982 to 8051, Comp. St. 1922, there existed in this state, in part by common law and in part by statute, a complete definition of the rights, liabilities, duties and powers of banks and those dealing with them in the character of depositors or otherwise. The present banking act was in effect superimposed upon the law as previously existing. The latter was changed only so far as expressly amended or as required by necessary implication to remove inconsistencies or repugnancies which might otherwise exist. Our present banking act bears internal evidence of the fact that it was framed with the law previously existing in contemplation of the legislature. Thus, there is even now no specific statutory definition of the terms "deposit" or "depositor" in the act before us. Indeed, the present law in terms purports to make no change in the rights and liabilities springing from this relation so far as the corporate entity, "the bank itself," is concerned. With reference to the guaranty fund therein provided, however, it expressly excludes from participation therein as deposits certain transactions which prior to its adoption were regarded as creating deposits. These exclusions are in the nature of exceptions to the rule of law

previously existing and are to be construed as such. If this is correct, we are justified in the conclusion that whatever transactions with a bank which previously entitled the participants therein to the rights of depositors were in effect, by the present law, continued as such and are protected by the guaranty fund, unless and except expressly excluded by the express terms or necessary implication of the new act or of the amendments thereto. There can now be no question that prior to the adoption of the present state banking act the deposit by a criminal, in a bank, of the proceeds of his crime, such as robbery, larceny and forgery, could be claimed from the depositee bank by the true owner as his own "deposit." *Aetna Indemnity Co. v. Malone,* 89 Neb. 260; *Lamb v. Rooney,* 72 Neb. 322; *Nebraska Nat. Bank v. Johnson,* 51 Neb. 546; *Logan v. Aabel,* 90 Neb. 754. Indeed, the rule recognized by this court was broader than above suggested. *Cady v. South Omaha Nat. Bank,* 46 Neb. 756.

It must be admitted that there is no express declaration in the present banking act as to stolen property or property obtained as the result of crime or the proceeds thereof deposited in a bank by a thief or criminal. In view of the fact that this criminal who obtained the property in controversy by criminal means was the president and active managing officer of the bank, recovery lies against the corporate bank involved and against its officers and stockholders. This is in strict accord with the unquestioned rule which is: "It is certain that a trust deposit received by a solvent bank knowing its true character can be recovered. Nor is its recovery conditioned in any way on its existence. Thus, a bank which credits the account of a depositor with a forged check can follow the money into the possession of any one who received it with knowledge of the fraud." 1 Bolles, Modern Law of Banking, p. 504. It is contended by the appellants that the right of the claimants to recover ought to be denied on the ground that the trustee *ex maleficio* who made the deposit was the active managing agent of the Dunbar State Bank, whose real purpose it was by the transactions in question to effect in truth and in fact a loan of funds to his institution. Nowhere in the present

banking act is there an express or implied denial of the right of a *cestui que trust* to recover, as a deposit, a deposit of his trust funds. Even if we concede that the contract before us, if made by Murray in his own behalf and for his private benefit as principal, would not be within the limitation of the guaranty fund because of the statutory prohibition in section 8033, Comp. St. 1922, as amended by section 24, ch. 191, Laws 1923, still the contention of appellant does not follow. Murray in this transaction, in contemplation of law, appears solely in the capacity of trustee *ex maleficio*. It would seem that the rule applicable is that the law does not require that a trustee as such in his individual capacity should have the competency to make the contract for himself or in his own behalf which he may legally make as trustee in behalf of his trust or principal. In support of this, attention is called to the following authorities: The rule applicable to this situation seems to be: "It is by no means necessary for a person to be *sui juris*, or capable of acting in his or her own right, in order to qualify himself or herself to act for others; and it is generally held that any one, except a lunatic, imbecile, or infant of tender years, may be capable of acting as agent for another, although he is not capable of acting for himself." 2 C. J. 430. Indeed, Justice Story, in his work on Agency, makes the following observation in this connection: "It is by no means necessary for a person to be *sui juris*, or capable of acting in his or her own right, in order to qualify himself or herself to act for others. Thus, for example, monks, infants, femes covert, persons attainted, outlawed or excommunicated, villains and aliens, may be agents for others." Story, Agency (9th ed.) p. 8. So, too, it was uniformly held that, during the existence of slavery in the United States, a master could constitute his slave his agent, whose contract would bind himself. Indeed, it was said: "A slave, who is *homo non civilis*, a person who is but little above a mere brute in legal rights, may act as the agent of his owner or his hirer." *Lyon & Co. v. Kent, Payne & Co.*, 45 Ala. 656, 663. "It is not questioned, that a master may constitute his slave his agent, and I cannot conceive of any

distinction between the circumstances which constitute a slave and a freeman an agent—they are both the creatures of the principal, and act upon his authority. There is no condition, however degraded, which deprives one of the right to act as a private agent." *Chastain v. Bowman,* 16 S. Car. Law, 270, 271.

While it must be conceded that there is a well-recognized difference between the power of an agent and a trustee, yet so far as the transaction before us is concerned there is a well-established analogy between them. It is to be remembered that equity has created the doctrine of trustee *ex maleficio* for the purpose of securing the return of funds taken as a result of fraud or theft from the true owners thereof. The foundation principle of equity in this connection is that, where all parties in interest are affected by notice of the actual facts, it concedes no power to such trustee to find the fund or in any manner affect the rights of the *cestui que trust* therein in the slightest degree by his conduct, his acts or his contracts. The underlying principle which supports recovery by the true owner in these cases is that the *cestui que trust* claims the money, the deposit, the note, or the item of personal property into which the money has gone, as his own property, not as a debt to him from the possessor of the property claimed. The fundamental controlling maxim in this connection is that "He who does an act through another is deemed in law to do it himself." While the intent, purpose, acts, conduct, contracts or situation of the trustee *ex maleficio* may not affect trust property in his hands which he does not own and merely possesses, still equity, disregarding all evil intent and purposes on the part of such trustee, holds the unlawful delivery of the trust estate to a person having actual knowledge of the true facts, at the election of the defrauded *cestui que trust,* as in law the act of the *cestui que trust,* and thus enables the latter to recover the property unlawfully disposed of by the defaulting trustee.

Applying this principle to the instant case, we conclude that, though the hand of Murray obtained the money, delivered it to the Dunbar State Bank and wrote the entries in the records thereof, in law the money was actually de-

livered to this bank by the *cestui que trust* himself through the hands of Murray. The record in this case furnishes no facts from which it can be implied that these defrauded banks, who parted with the possession, though not the title, of their money on the strength of forged notes, had any knowledge of the true situation or were actuated by any motives denounced by section 8033, Comp. St. 1922, as amended by section 24, ch. 191, Laws 1923. And to say that the rights of the *cestui que trust,* who is admittedly innocent of evil intent, can be affected by the intent and purposes of a trustee *ex maleficio* dealing with stolen funds obtained from such *cestui que trust* and with parties who had actual notice of the real situation is to state a conclusion wholly at variance with the conceded principles of law. And as in law the *cestuis que trust* by the hand of their trustee *ex maleficio* placed this money in the Dunbar State Bank's control and by the same hand accepted the rights of a depositor which they were entitled to enforce under the law of the land; their rights so to do cannot be modified or affected by the purposes, intent or motives of a thief or criminal whose possession in his private capacity created no title to or rightful control over the property in suit. Such was the undoubted rule before the adoption of our present banking act. *Newton v. Porter,* 5 Lans. (N. Y.) 416; *Hoffman v. Carow,* 22 Wend. (N. Y.) 285; *Bassett v. Spofford,* 45 N. Y. 387. This act does not in terms purport to change the established principle that the true owner is wholly unaffected by the acts of a criminal who by criminal means has secured possession of his property as to all who know of that fact. This is the interpretation which this court has universally given the present banking act as heretofore applied. Thus, in *State v. Brown County Bank,* 112 Neb. 642, it was held: "When a bank receives the proceeds of chattels on which a third party held a valid first mortgage, with knowledge that the sale was made without the consent of the mortgagee, and that the ownership of the deposit is in the mortgagee, it is liable to the mortgagee for the sum deposited,

and if the bank becomes insolvent before paying the same, the mortgagee may enforce payment from the guaranty fund." It will not be denied that the mortgagor who made this unlawful sale and deposit must be regarded as a trustee *ex maleficio*. So, too, in the following cases referred to as the Wentz cases: *State v. American State Bank,* 108 Neb. 111; *State v. American State Bank,* 108 Neb. 124; *State v. American State Bank,* 108 Neb. 129. Wentz, in violation of his duties as managing officer of the bank, criminally diverted funds from their lawful channel to his own enrichment. It was held that the bank and guaranty fund were liable. It will be noted that Wentz was a trustee *ex maleficio* and that each of the transactions referred to in these cases arose and the decisions were made since the adoption of the amendment of 1917. Also, in *United States Nat. Bank v. Dunbar State Bank,* 118 Neb. 624, we find a case where an action was brought to recover the proceeds of one of the three forged notes hereinbefore referred to by the bank to which it was negotiated as a valid loan. In that case on facts identical with those here presented this court held: "Proceeds of a forged note indorsed by the payee to a state bank and by the latter knowingly and fraudulently uttered and negotiated at its face value may be traced into such bank, identified as a deposit therein, and so treated in a suit in equity by the party defrauded"—and awarded judgment against the guaranty fund. It is to be noted that this case is strictly in accord with principles that determined the Wentz cases above cited. This case is controlled by *State v. Brown County Bank,* 112 Neb 642, and *United States Nat. Bank v. Dunbar State Bank,* 118 Neb. 624.

The court is unanimously of the opinion that these opinions state the law applicable to these cases, and, in conformance to the rules there announced, the judgment of the trial court is affirmed and the former opinion is withdrawn.

AFFIRMED.

ARTHUR J. KERNAN, APPELLEE, V. MODERN WOODMEN OF AMERICA, APPELLEE: STEWART F. KERNAN, APPELLANT.

FILED OCTOBER 17, 1930. No. 27316.

1. **Statutory Provision.** Record examined and the issues and facts therein presented found to be governed by section 7920, Comp. St. 1922 (Comp. St. 1929, sec. 44-1217), which reads as follows: "No contract between a member and his beneficiary that the beneficiary or any person for him shall pay such member's assessment and dues, or either of them, shall deprive the members of the right to change the name of the beneficiary."
2. **Insurance:** CHANGE OF BENEFICIARY. Further, the fact that the original beneficiary pays any or all of the dues and assessments prior to the change of beneficiary does not modify or avoid the above statutory provision.
3. **Evidence:** INSURANCE: CONTRACT. It not being charged in the pleadings nor shown by the proof that the laws of other states, if pertinent, are other or different than those existent in this state, it is conclusively presumed that section 7920, Comp. St. 1922, which was in full force and effect at the dates involved herein, entered into and became a part of the respective insurance contracts here under consideration.
4. **Fraud:** PRESUMPTION. "Fraud is never presumed, but must be established by the party alleging it by clear and satisfactory evidence." *Hampton v. Webster*, 56 Neb. 628.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Reversed, with directions.*

Battelle, Morgan, Strehlow & Anderson, for appellant.

Smith, Schall & Sheehan, contra.

Heard before ROSE, DEAN, GOOD, THOMPSON, and EBERLY, JJ., and LESLIE, District Judge.

THOMPSON, J.

This action was instituted by Arthur J. Kernan, hereinafter called appellee, against Stewart F. Kernan, appellant, and the Modern Woodmen of America, appellee, hereinafter referred to as insurer, to recover the sum of $1,000 on a certain fraternal benefit certificate of insurance issued by such insurer on the life of the father of the above named

Kernans in the sum of $2,000 payable in equal amounts to each of such Kernans, and to have a certain subsequent certificate issued to such father for the same amount, and made payable to the appellant alone, canceled and held for naught, which appellee alleged had been issued through fraud and circumvention. At the trial the insurer appeared and answered, pleading sufficient facts to absolve it from further contention as between the parties; alleging that it had paid to appellant $1,000 and that it be permitted to bring the other $1,000 into court to be disposed of as might on final hearing be found to be just and equitable, which was so ordered. The appellant for answer and cross-petition alleged, in substance, that the certificate made the basis of appellee's claim had been canceled at the request of the father and another certificate issued and delivered by the insurer to such father, for the same amount, in which certificate the appellant was made the sole beneficiary, all in harmony with the terms of the certificate, by-laws of the insurer, and the law applicable thereto; and denied appellee's allegations of fraud and circumvention. Appellant prayed, in substance, that the appellee's petition be dismissed; that the $1,000 paid into court by the insurer be released and paid to him; and that appellee pay all costs.

On submission of these issues the trial court found generally in favor of the appellee, except that out of the $1,000 paid into court the sum of $45.68 was ordered paid to appellant for dues and assessments advanced by him on the two certificates over and above his rightful share, and so entered decree. To reverse this judgment appeal is had.

From an examination of the record, we find the following pertinent facts reflected: On August 26, 1896, the father procured to be issued and delivered to him by the insurer (a fraternal beneficiary association of Illinois, and doing business in this state) a benefit certificate of insurance on his life for the sum of $2,000 payable at his death to his then wife. He complied with all the conditions of such insurance contract on his part until in February, 1911, when, he and his wife having separated, he surrendered such certificate and procured another to be issued and de-

livered to him as a member of the Fremont, Nebraska, Camp of the insurer, for the same amount, designating therein as his beneficiaries, to the extent of $1,000 each, the two sons of the above indicated marriage, Arthur J. Kernan and Stewart F. Kernan, appellee and appellant herein respectively. The insured father paid the dues and assessments on such certificate until some time in 1915, when he was about to leave this state and take up his residence in South Dakota, at which time he delivered the certificate to his aforesaid sons, who remained residents of this state. These sons agreed between themselves, which was assented to by the father, that Arthur should make all payments on the certificate coming due and payable in the even-numbered months and Stewart in the odd-numbered months. These arrangements continued and were fairly complied with by each son until in 1918, when it was agreed between these two brothers that, during the time Stewart was serving in the United States navy, Arthur would pay all dues and assessments on the certificate from the time of Stewart's leaving in July, 1918, until his return in June, 1919, which he did. On Stewart's return he reimbursed his brother Arthur for all moneys so advanced. However, thereafter, Arthur failed and neglected to keep up his share of such payments, and Stewart was compelled to, and did, pay the same to the extent of $25.10; that Stewart, becoming dissatisfied with the situation, communicated with Arthur by letter dated August 7, 1927, in reference thereto, in which letter, among other things, he stated to Arthur: "At this time you owe me $25.10 starting June, 1926, and including August, 1927." Arthur neglected to pay, using as an excuse the claim that when Stewart was hard pressed for money he had advanced all dues and assessments, and now as he, Arthur, was hard pressed Stewart should make the payments. Thereupon Stewart forwarded the correspondence to the father at his home in South Dakota. After receiving and considering the same the father executed and forwarded to the insurer the necessary papers for the surrender of this joint certificate and the issuance in lieu thereof of a new certificate for the same amount pay-

able to his son Stewart. This requested change was perfected by the insurer in September, 1927, and the new certificate forwarded to the insured. Thereafter Stewart paid all dues and assessments for something over a year, when the insured father died.

The first certificate being only incidentally involved, was not introduced in evidence. However, we have before us the second and the third.

It will be noticed from the statement of the issues that it is admitted that the certificate made payable to the two sons was canceled by the insurer at the request of the insured, and that the certificate made payable to the appellant alone was issued and delivered to insured in lieu thereof. However, in order to avoid the force and effect of this last certificate, the appellee urges that it was fraudulently procured by Stewart. The burden of proof of this fraud is carried by the appellee at all times. In the course of the opinion in *Goodrich v. Equitable Life Assurance Society*, 111 Neb. 616, 621, it is stated: "In the absence of proof, the court will not presume bad motives or bad faith." We held in *Hampton v. Webster*, 56 Neb. 628: "Fraud is never presumed, but must be established by the party alleging it by clear and satisfactory evidence." This the appellee has wholly failed to do.

Section 7920, Comp. St. 1922, provides: "No contract between a member and his beneficiary that the beneficiary or any person for him shall pay such member's assessment and dues, or either of them, shall deprive the members of the right to change the name of the beneficiary." This section was in full force and effect at the dates involved herein. There being nothing in the pleadings or the proof indicating that the laws of Illinois or South Dakota, if pertinent, are, or were, other than those existent in this state, it is conclusively presumed that the aforesaid section 7920 entered into and became a part of the respective insurance contracts involved in this instant case, and is controlling herein. The fact that the original beneficiary paid any or all of the dues and assessments prior to the change of beneficiary does not modify or avoid the above quoted statutory

provision. *Smiley v. Modern Woodmen of America,* 112 Neb. 10, 13.

In *Fisher v. Donovan,* 57 Neb. 361, we held: "A certificate in a fraternal beneficiary society is a mere expectancy, and the beneficiary has no vested right therein." And in *Ogden v. Sovereign Camp, W. O. W.,* 78 Neb. 804, it was held: "Where the members of a fraternal beneficiary association have the right to designate and change the beneficiary, the beneficiary is not a party to the contract and acquires no vested right therein during the life of the assured."

The case of *Supreme Council of the Royal Arcanum v. Behrend,* 247 U. S. 394, as reported in 1 A. L. R. 966, will be found instructive as to the matters involved herein, as well as to the legal difference between ordinary life insurance and that furnished by the fraternal benefit societies.

The insured father was clearly within the law, as well as within his contract of insurance, in procuring the first and second certificates, respectively, to be canceled and the third certificate issued and delivered to him. Thus, the appellee is without just cause for complaint.

The judgment of the trial court is reversed and the cause remanded, with directions to enter judgment in favor of the appellant and against the appellee, Arthur J. Kernan, for the $1,000 paid into court by the insurer, and to order that each party pay his own costs, including those of this court.

REVERSED.

MAY PHELPS, APPELLANT, V. METROPOLITAN UTILITIES DISTRICT, APPELLEE.

FILED OCTOBER 17, 1930.. No. 27303.

Evidence examined and *held* to require the submission of the case to the jury.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Reversed.*

Gray & Brumbaugh, for appellant.

Dana B. Van Dusen and *Hasselquist & Chew, contra.*

Heard before ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ.

EBERLY, J.

This is an action for personal injuries brought by appellant, hereinafter designated as plaintiff, against the appellee, hereinafter designated as defendant, in the district court for Douglas county. Issues were joined, and trial to a jury. At the conclusion of the evidence of both parties, the motion of defendant that the court instruct the jury to return a verdict in its favor, or that the jury be discharged and judgment be rendered in its favor by the court, was sustained, and thereupon the jury were discharged and the court upon consideration of the evidence found in favor of the defendant and dismissed the action. From the judgment rendered in favor of defendant and the overruling of her motion for new trial plaintiff appeals.

So far as the determinative issues in the case are concerned, they may be said to be the issues joined by the allegations contained in plaintiff's petition that defendant in its work of lowering water mains excavated a hole two by four feet in size down to the main, and in refilling negligently refilled said hole without tamping or wetting same down so as to prevent settling of soil replaced, all in violation of ordinance No. 13208, as a result of which plaintiff fell and was injured; that, having failed to refill said hole and having left the soil replaced in a loose and unsafe condition, defendant failed to provide lights, signals or guards to warn plaintiff of the dangerous condition, as a result of which plaintiff received the injuries complained of. The fact that there was an excavation made of a nature substantially as alleged in plaintiff's petition by some one; that plaintiff stepped into the loose soil of said excavation and was caused thereby to fall, breaking the external malleolus of the left foot and thereby suffered serious injury, is fairly established by the evidence.

The question presented by the proof is, however: Has the plaintiff established by her evidence the existence of

facts from which it may be fairly inferred that the hole in question was excavated by the servants of the defendant? And important as relating to the identification of the hole excavated and its connection with the defendant's servants, according to the view of defendant, is its location with reference to the water main belonging to the defendant.

The scene of the accident was situated in Curtis avenue in or near the intersection of that avenue with Thirty-eighth street in the city of Omaha. It is quite evident that the district court directed a verdict on the basis that the defendant had established by practically uncontradicted evidence the location of the curb line at the scene of the accident and its situation with reference to the water main there situated; that plaintiff's witnesses having located the excavation causing the injury north of the "curb line," and according to the witnesses for the defendant there being some four or five feet intervening between the water main at this point and the north curb line, the excavation in question could not have caused the injury. We think the court erred in accepting the facts enumerated as substantially established for the basis of his action.

It seems conceded by all parties to this litigation that at the time of the accident there was, so far as shown by the record, no "curb line" in any manner indicated on the ground. Indeed, it appears that it had not been definitely marked or established long after that event. Speaking of a date some two months prior to April, 1929, almost two years after the occurrence of the accident, Mr. Galloway, one of defendant's witnesses, says: "Q. Now, there is no curb there now, is there? A. No. Q. So, of course, your statement that the curb line was so far from the water main was just an approximation, wasn't it? A. Yes. Q. Of where the curb line might be? A. Yes." Nevertheless, all plaintiff's witnesses were cross-examined, over objections, with reference to a "curb line," the location of which was not in any manner indicated by reference to visible objects, nor in any other manner definitely located on the terrain and which had no possible existence save and ex-

cept as a mental concept. Not only cross-examination of plaintiff's witnesses was related to this subject, but defendant's testimony was also directed to the matter of this "curb line" that had no actual existence in fact. Exhibit 3, a purported map of the *locus in quo* which appears in the record, was presented to each of defendant's witnesses who testified with reference to the scene of the accident. Each of these persons stated that it was a correct representation thereof. It may be said, in passing, that this map discloses no "curb line" whatever. But defendant's witness Galloway says on this subject: "Q. Can you tell the jury where the approximate curb line would be in reference to the water main? A. Well, I would say it would be about five feet south of the south sidewalk line—south of the south edge of the north walk. Q. You mean that the curb would be five feet south of the south edge of the walk? A. Yes; on the north side of the street. Q. And that your water main would be five feet south of the curb line? A. Yes, sir." So, also, Mr. Edling, the field engineer of the defendant, in his testimony says that exhibit 3 is correct, and further testifies, "assuming that there was a curb there," which in fact never had an existence: "Q. Approximately how close, then, is the water main to the curb line? A. Four feet." There is here a discrepancy of approximately one foot. But these figures do not relate to actual distances between definite objects, but to what the actual distance was between the location of the water main and where, according to the opinion of the witnesses, the "curb line" should have been, had there been one. There is nothing in the record which in any manner discloses where, in the opinion of plaintiff's witnesses, this curb line should have been located, but the defendant proceeds upon the theory that the plaintiff's and defendant's witnesses were in substantial agreement on this important matter.

In this connection the correctness of exhibit 3 becomes important. Is it in truth a correct representation of the terrain upon which the accident occurred? Inherent within itself we find evidence which conclusively establishes

the negative. Assuming that the distances as legibly marked on this map control over the results of the actual application of the scale appearing thereon, these figures indicate that there are 24 feet between the water main and the "north property line" adjacent thereto. In this connection it is a conceded fact in the record that this water main is 8½ feet north of the center of Curtis avenue. This distance in connection with the distances appearing on the map, exhibit 3, supports the conclusion that the north half of Curtis avenue is then 32½ feet in width. This would indicate a 65 foot street, and it is quite apparent from the other portions of the record that Curtis avenue, in this vicinity at least, is but 60 feet in width. Then, again, on the basis of a 60 foot street, with the water main situated 8½ feet north of the center thereof, it could be no more than 21½ feet from the water main to the "north property line." The distance of 24 feet as indicated on exhibit 3 is therefore palpably erroneous.

It must be conceded also that defendant's evidence relating to the relative situation of the water main, and the point where the curb line ought to be, is entirely based upon the correctness of exhibit 3. We are not unmindful that "a certain permissible error" may exist in surveying and mapping, and that any casual error not exceeding this in extent would not be subject to any particular criticism. However, considering the nature of the work before us as reflected by exhibit 3, and assuming that an error represented by the fraction 1/1500 might not be deemed material, we find that the fraction representing the error appearing in exhibit 3 is more than 1/9. *Quære*: Can such errors be disregarded in view of the use made of and the reliance on exhibit 3 by the defendant?

However, without further discussion of the accuracy and force of defendant's evidence, it may be stated that, in view of the nature of the proceedings before us for review, the plaintiff is entitled to have as conclusively established every point favorable to her which her evidence tends to establish; and, conversely, a trial court is not justified in directing a verdict for the defendant unless, con-

sidering all facts favorable to the plaintiff conclusively established so far as the plaintiff's evidence tends to prove them and including all inferences properly deducible therefrom, it is able to say as a matter of law that the plaintiff is without ground upon which to recover. And for this purpose it is not necessary that the proof in the record be made by direct evidence, as these facts may be made to appear either directly or circumstantially. *Lammers v. Boehmer,* 62 Neb. 159; *Central Nat. Bank v. Ericson,* 92 Neb. 396; *Shawnee State Bank v. Vansyckle,* 109 Neb. 86; *Curtice Co. v. Estate of Jones,* 111 Neb. 166; *Stohlman v. Davis,* 117 Neb. 178.

At least one of plaintiff's witnesses testified positively that he, in conjunction with his brother, some time prior to the accident in controversy herein, excavated a trench for the water pipe connecting this identical water main with his mother's house in the near vicinity of the scene of the accident. Thus, he had a decided reason to know the location of this water main in Curtis avenue without reference to any mythical "curb line" that had no actual existence. This witness also testified positively that prior to the accident a hole, the exact location of which is in controversy, was dug down to this water main, and the depth thereof measured by a man who thereafter rejoined a group of men, admittedly the employees of the defendant, at their work on Curtis avenue near the scene of the accident. This witness further testified that this man had been digging with and as a part of the gang who were then and there lowering the water mains and that the location of this hole was the place where the plaintiff was injured. This, in view of the surrounding facts and circumstances, sustains plaintiff's theory that the excavation thus made was the excavation that caused plaintiff's injury. It is substantial evidence at least which would sustain a verdict if believed, and while this witness' cross-examination as disclosed in the record may have a tendency to detract from the force of his statements, it could and did accomplish no other purpose than affect his credibility. Credibility of witnesses is a matter which forms

no element of the question involved in the motion to instruct a verdict such as was presented and sustained in the instant case.

Indeed, from a careful reading of the record as an entirety, we are impressed with the view that we have a situation here presented to which the following quoted words employed by Weaver, J., in *Richards v. Watts,* 147 Ia. 557, are singularly appropriate and applicable: "The bare statement of the facts demonstrates the erroneous character of the judgment. * * * It ought not to be necessary to say that the credibility of the witness and the value of his testimony were matters for the jury alone. Counsel may have believed him utterly unworthy of credence and the court may have fully sympathized with that view, nevertheless, it was the right of the plaintiff to have the judgment of the jury thereon. To sustain the judgment in this case would be to establish a precedent destructive of the fundamental principles underlying our jury system. No argument can add emphasis to a self-evident proposition."

It may be said in passing, however, that the attorney now representing the appellee in this court did not participate in any manner in the trial in the district court, and is in no degree responsible for the situation disclosed by the record before us.

It follows therefore that the action of the trial court in this instant case was not justified by the record on which it is based. Accordingly, the judgment of the district court is reversed and the cause remanded for further proceedings in accord with this opinion.

REVERSED.

ROBERT L. LEWIS ET AL., APPELLANTS, V. O. H. EYERLY ET AL., COUNTY COMMISSIONERS, APPELLEES.

FILED OCTOBER 17, 1930. No. 27236.

1. **Counties:** CREATION OF PRECINCT. On July 26, 1926, the board of county commissioners of Lincoln county, Nebraska, under and by the authority granted them by legislative act, as found in

section 885, Comp. St. 1922, formed and created what is known as "Maxwell precinct" for political and administrative purposes. Where the evidence discloses no direct fraud practiced in the formation and creation of said precinct by said board, *held* that the action of the board was regular and the creation of the precinct legal.

2. ———: BRIDGES: ELECTION: PETITION: FRAUD: PROOF. Where a party alleges fraud in procuring signatures to a petition to be presented to a county board, praying that said board will call a special election in the precinct to vote on a proposition to bond the precinct to raise funds for the purpose of constructing a public bridge over a river running through said precinct, plaintiff must not only prove by a preponderance of the evidence that said signatures were procured by fraud, but must further prove by a preponderance of the evidence that said signatures procured by such fraud were necessary to give the board authority to call said election.

3. ———: ———: ———: VALIDITY. Upon an examination of the official ballot, as submitted to the electors at the election of December 27, 1928, the court finds that the same was regular; and, when the record does not disclose that the electors were deceived as to the issue, the same will be held legal.

4. ———: ———: ———: ———. On December 27, 1928, there was submitted to the electors of Maxwell precinct at a special election the question of issuing bonds to procure funds for the construction of bridges over and across certain channels of the Platte river. The petition presented to the county board of commissioners, praying for the calling of such election, and the published notice given by the board calling the same, both set out fully how and where the money was to be used, and naming certain conditions to be performed by other parties before said bonds should become effective. *Held*, that said election was valid, and that, upon the performance of the conditions of said second parties, said bonds could be legally issued.

APPEAL from the district court for Lincoln county: J. LEONARD TEWELL, JUDGE. *Affirmed.*

Halligan, Beatty & Halligan and *Milton C. Murphy*, for appellants.

Beeler, Crosby & Baskins and *C. S. Beck, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY and DAY, JJ., and JAMES and WRIGHT, District Judges.

JAMES, District Judge.

This is a suit in equity brought by the plaintiffs as resident electors and taxpayers within the territory which the defendants, as county commissioners of Lincoln county, attempted to create into a voting precinct under the name of "Maxwell precinct." The defendants are the commissioners of said county. The object of the suit is to enjoin the issuance and delivery of certain precinct bonds voted by the said Maxwell precinct in said county, said bonds to be used for the purpose of constructing a series of wagon bridges over and across the channels of the Platte river. Then follows a description of the location of the proposed bridges.

The history of this case in general is as follows: On July 26, 1926, the board of county commissioners, at a regular adjourned session, by an order, formed out of certain territory what has been referred to as the new "Maxwell precinct." On August 6, 1926, there was filed in the office of the county clerk of Lincoln county, Nebraska, a petition praying for a special election to be held in Maxwell precinct of said county, submitting to the electors the question of issuing bonds in the sum of $35,000, to be used in constructing a series of wagon bridges across certain channels of the Platte river, and also giving the location of the bridges. This matter was taken up at a regular session of the board of commissioners on August 16, 1926, and a special election was ordered held on October 12, 1926, in said precinct. Notice of this election was given as required by statute, and the law seems to have been fully complied with. The election was held and resulted in favor of the bonds. The bonds were then issued and registered in both county and state, as required by law. No further action was taken, so far as the records show, toward construction of the bridges. On November 10, 1928, another petition was filed with the commissioners, praying that a special election be called to submit to the electors of said precinct the question of canceling the $35,000 bond issue and voting on the question of issuing $40,000 bonds, including changing the location of the

bridges, all providing, however, that the government and the state would render certain assistance in the construction of the bridges. On the 19th day of November, at a regular session, the board issued an order calling a special election for December 27, 1928, which election was held, and resulted in favor of the bonds.

The petition of the plaintiffs is quite voluminous, but upon a careful analysis the court has come to the conclusion that the material charges contained therein are as follows:

(1) That the formation of Maxwell precinct was procured by fraud; (2) that the signatures to the petition, asking the board of commissioners to call an election, was procured by fraud and misrepresentations; (3) that the proposition of voting bonds was not legally submitted by the official ballot; and (4) that a precinct cannot legally vote bonds to construct a bridge at a point where no highway has been established.

If any one of the above propositions contended for by appellants should be decided in their favor, then the case should be reversed. In order that the case may be affirmed, all of said propositions must be decided in favor of the appellees.

1. Was the formation of Maxwell precinct procured by fraud? Under this proposition, the board of commissioners attempted to act under section 885, Comp. St. 1922, which gives to a board the power to create and change voting precincts. This statute, as it stood at the time of the transaction in question, is as follows:

"Each board of county commissioners shall divide the county into convenient precincts and, as occasion may require, erect new ones, subdivide precincts already established and alter precinct lines. And whenever any portion of territory containing in the aggregate not less than one township of land, and not more than four townships lying contiguous, shall contain not less than fifteen voters, it shall be the duty of the county commissioners, on receipt of a petition signed by a majority of the legal voters therein, to constitute such portion of the territory a voting

precinct: Provided, that all of the territory within the corporate limits of a city of the second class or village shall be included within some voting precinct having a polling place within such city or village."

The new Maxwell precinct embraces within its boundaries several precincts and parts of others, its length extending thirty miles north and south and from six to ten miles east and west.

The county commissioners on July 26, 1926, at a regular adjourned session of the board, enacted an order forming and creating the new Maxwell precinct, a copy of which is as follows:

"Commencing at the southeast corner of section 36, township 9 on range line between ranges 27 and 28; thence north on range line to the northeast corner of section 1, township 13, between ranges 27 and 28; thence west to the northwest corner of section 6, township 13, range 28; thence south to the Platte river bank between sections 19 and 24, township 13, between ranges 28 and 29; thence northwesterly along bank of river to the west line of section 8, township 13, range 29; thence south on section line to the south bank of the Platte river; thence southeasterly along the south bank of the river to the northeast corner of section 21, township 13, range 29; thence south on section line 18 miles to the southwest corner of section 16, township 10, range 29; thence east 4 miles to the southeast corner of section 13, township 10, range 29; thence south 9 miles to the southwest corner of section 31, township 9, range 28; thence east 6 miles on county line to point of beginning; into a precinct to be known as Maxwell precinct."

Our courts have held that precincts are "mere territorial divisions or districts created for certain political and administrative purposes, and without the semblance of corporate character." *State v. Dodge County,* 10 Neb. 20.

The petition charges that the formation of this precinct was procured by fraud. The only evidence in support of this allegation is the record of the board's act. Under said section 885, Comp. St. 1922, the commissioners have the

power and it is their duty to form or change precincts in order that the inhabitants thereof may carry on the business of their precinct reasonably and fairly to all. There is no evidence of any fraud having entered into the proceedings had by the commissioners in their attempt to create Maxwell precinct. It was done at a regularly adjourned meeting, with all members of the board present. It is true that the territory included in this new Maxwell precinct is exceptionally large. But would that alone constitute fraud to the extent of rendering their acts illegal? It is also true that the charge is made that the precinct was formed for one purpose only—voting bonds for the erection of bridges over the Platte river. Such may be the fact, but there is no evidence in the record sufficient to warrant the court in making such finding. After a study of this charge, and the evidence in support of it, and applying thereto the provisions of section 885, Comp. St. 1922, the court is forced to the conclusion that the record does not disclose any act that would establish fraud or any irregularity in the creating of the precinct which would warrant the court in holding that it had been fraudulently created; and, so far as the formation of Maxwell precinct is involved herein, the court holds that the same was legally formed.

2. Was the petition presented to the county board of commissioners procured by false representations? The evidence in support of this proposition was of three voters, who were solicited to sign the petition, and it consists of conversations between Lewis E. Story, the solicitor for signatures to the petition, and F. C. Christensen, E. C. Hostetter, and J. L. Burke. These last three named gentlemen were called as witnesses on behalf of the plaintiffs, and their testimony in connection with the allegation that their representations influenced the voters in signing the petition is as follows:

F. C. Christensen: "Q. What, if any, statements did he make to you with reference to what would be done if the bridge bonds were voted there for the building of this bridge, in the manner of the government paving the high-

way out to Fort McPherson there? A. Why, he made a statement that the government would pave the road from Fort McPherson to Maxwell. Q. Now, was that statement made to you before—just withdraw that—did you sign the petition for the calling of the election to vote on the $40,000 bonds? A. Yes. Q. Was this statement made to you prior to the time that you signed the petition? A. Yes; that was the inducement to have me sign the petition. Q. And did you sign the petition believing that? A. Yes; I did. Q. And had you known that the federal government was not going to pave from Maxwell to Fort McPherson would you have signed the petition? A. No; I would not."

E. C. Hostetter: "Q. Did you ever have any talk with Mr. Story about—prior to the holding of this last election? A. Yes, sir. Q. As to what the federal government would do if this new bridge was located on the new route? A. Yes, sir. Q. When did you have that talk with him? A. Oh, quite a while before the—I don't know the date, but quite a while before election. Q. And just what did he say to you there, Mr. Hostetter, about that matter? A. Well, the first he came to me and he asked me how I thought about changing the bridge down there if the government would pave it three miles to the cemetery and get a highway through there, and I told him I didn't know but what I would be in favor of that. Q. And what, if any, other statement was made with reference to a highway being established from Fort McPherson south to the county line through the new precinct? A. Well, I don't know as Story made that one. They said it would be a federal aid on the state highway, the state maintain it on the south highway, that is, Story, but there is a lot of them down the line said they was getting a state highway through there. Q. Was it generally talked around Maxwell there and in this new precinct that the federal government was going to pave this three miles if the bridge was built? A. Yes, sir."

Cross-examination: "Q. Mr. Hostetter, that was a considerable length of time before election was had? A. Not so very far before; yes. Q. And it was pretty generally talked that the paving wasn't going through just before

election was held? A. Yes. Q. And that was generally known? A. Yes. Q. You knew of it? A. Sure."

J. L. Burke: "Q. Have you ever talked to Mr. Story, Mr. Burke, about what the federal government would do prior to the election if this $40,000 was voted to build a bridge there? A. Yes, sir; I did. Q. And what talk did you have with him? A. Well, the government was to build and the state was to build and pave a bridge across from Maxwell. Q. You said 'pave a bridge,' you mean— A. Pave the road and build a bridge across from Maxwell to Fort McPherson cemetery, and the bridge, so he said, would be a little farther on for you but you would have a good road; that was his cry and talk at the time. Q. Do you know whether or not that was generally talked there before the election? A. Yes, sir; it was. Q. That the government would build and pave the highway? A. Yes, sir."

Cross-examination: "Q. But you knew that this paved road wasn't going to be put through before election? A. That was my first understanding about the paved road, was all. Q. Well, what I am asking you, you knew before the election was actually had that it was not going to be paved, didn't you? A. Yes; I guess that is right. Q. And you heard other people discuss it too, didn't you? A. Yes; I heard them."

This was all the evidence as to fraud, as disclosed by the record.

To this evidence Mr. Story, the solicitor, testified as follows: "Q. When was the last time that you know of, Mr. Story, that the question of paving from Maxwell to Fort McPherson was talked? A. Well, I couldn't give the date exactly, but the engineers, the federal engineers, were surveying down there; they were running over the old route and then the route east, to make a report on the locations, and these reports started while they was making their surveys, making investigations. Q. When was that, about what month, can you tell us? A. Well, I imagine it would be in August; might have been the latter part of July, but I think it was in August. Q. And when was it that you

learned that the federal government would not pave from Maxwell to Fort McPherson? A. That was September 26. I asked Mr. Shoemaker plainly. We had a delegation from Maxwell and from the island, south side, come up here and meet with the federal engineer and the state engineer, Roy Cochran, and talk over the proposition, and I asked Mr. Shoemaker plainly if we accepted this new proposition will the government pave it, and he said: 'No; they won't consider that route at all.' And I considered that was definite enough. Q. And after that time did you ever tell anybody that the government would pave from Maxwell to Fort McPherson? A. I did not."

The county commissioners, before calling an election for any precinct to vote bonds for any purpose authorized by statute, must have presented to them a petition signed by not less than 50 freeholders of the precinct, praying for the calling of a special election. The county commissioners obtain their authority for calling special elections upon the filing of such petition under the first subdivision of section 330, Comp. St. 1922, which provides there shall be "a petition signed by not less than fifty freeholders of the precinct," praying for the calling of a special election. "Upon the reception of such petition the county board shall give notice and call an election in the precinct."

On November 10, 1928, there was filed in the office of the county clerk of Lincoln county, Nebraska, a petition praying for the calling of a special election to be held in Maxwell precinct, for the submission to the electors of a cancelation of the $35,000 bond issue voted at a former election, and the further question of voting a $40,000 bond issue for the same purpose, i. e., erecting bridges. The petition sets out fully the questions to be submitted, and is signed by 72 freeholders. Were they procured by fraud? The record shows that only three witnesses testified as to these representations, and of these three only one signed the petition.

Have the plaintiffs established the allegation of fraud in procuring signatures to the petition which was presented to the board of commissioners by a preponderance of the

evidence? Even if the signature of Christensen was procured by fraud, would that warrant the court in finding in favor of the plaintiffs and enjoining the issuance of the bonds? As stated, 72 freeholders signed the petition, and, so far as the record shows, Christensen was the only one to whom any false representations were made. The other 71 make no complaint.

"In the absence of evidence to the contrary, honest and fair dealing in all transactions are always to be presumed; and, if any person claims there was fraud in any transaction, it devolves upon such person to prove the fraud, and it does not devolve upon the party charged with committing the fraud to prove that the transactions were honest and *bona fide*." *Long Bros. v. West & Co.*, 31 Kan. 298.

It is the opinion of the court that, where a party alleges fraud in procuring signatures to a petition to be presented to a county board, praying that said board call a special election in the precinct to vote on a proposition to bond the precinct to raise funds to construct a public bridge over a river running through said precinct, said party must not only prove by a preponderance of the evidence that said signatures were procured by fraud, but must further prove by a preponderance of the evidence that said signatures procured by fraud were the moving cause of the action of the board in calling said special election. The court finds upon a careful consideration of the evidence offered by plaintiffs on the allegation of fraud, as set out in their petition, in procuring signatures of the freeholders, that plaintiffs have failed to established such fraud by a preponderance of the evidence.

3. Was the question of voting bonds void, as submitted, on account of the form of the official ballot? The question to be submitted by the board, for the election to be held on December 27, 1928, contained two primary propositions: First. "Shall the board of county commissioners of the county of Lincoln, state of Nebraska (provided and conditioned on the cancelation and annulment of the thirty-five thousand and no/100 ($35,000) dollars of Maxwell precinct bridge bonds heretofore voted, executed and regis-

tered) issue forty thousand and no/100 ($40,000) dollars of Maxwell precinct bridge bonds?" In this call there was included the question of the cancelation of the $35,000 bonds, and also the provision that, if the issue of $35,000 bonds were not canceled, then the $40,000 bonds should not be carried. The official ballot submitted the two propositions—one for and one against each one. The first part of the official ballot used at the election provided for those wishing to vote in favor of issuing said bonds as follows: "☐ For issuing forty thousand and no/100 ($40,000) dollars of Maxwell precinct bridge bonds (provided and conditioned on the cancelation and annulment of the thirty-five thousand and no/100 ($35,000) dollars of Maxwell precinct bridge bonds heretofore voted, executed and registered.)" That part of the official ballot for voting against the issuance of said bonds was the same as the part which provided for voting in favor of said bonds, except it contained "☐ Against." On the same ballot there appeared the other proposition, both the affirmative and negative vote. The affirmative was: "☐ For canceling and annulling and to cause to be canceled and annulled and not issue the thirty-five thousand and no/100 ($35,000) dollars of Maxwell precinct bridge bonds voted on October 12, 1926, and dated January 1, 1927." On the same ballot the negative was exactly in the same form as the affirmative except "☐ Against."

The contention of the plaintiffs is that these ballots were not definite and certain, and that to some extent they contained alternative propositions to be voted upon so that the voter is required to vote in the affirmative or negative upon more than one proposition in casting a single ballot. There has been nothing presented to the court on this proposition as to the illegality of submitting this proposition in the form in which it was presented; that is, there is nothing in the law that would forbid submitting a question as this was submitted, if the propositions are plain to the elector. It is true, the general rule of law is that a proposition submitted to an elector must be submitted in such manner that the elector knows definitely and certainly just how to

vote for or against the proposition submitted. From an examination of this ballot, it appears that it expresses: First. Shall or shall not the $40,000 bonds be issued? Second. Shall or shall not the $35,000 bonds be canceled? It appears to the court that the notice of the election and the form of the official ballot gave the elector a clear understanding as to voting in the affirmative or negative upon the two propositions—one for or against the $40,000 bond issue, and the other for or against the cancelation of the $35,000 issue. There is no evidence in the record showing that any elector was misled in any way by the form of the official ballot, or by the propositions submitted. It is the conclusion of the court that the proposition submitted to the electors at the election held on December 27, 1928, was fair, definite and certain, and did not contain alternative propositions which would mislead or embarrass the elector as to what proposition he was voting for or against, to the extent that the election should be held void.

4. The proposition, or objections raised by the appellants, as to the legality of the bonds to be issued, is in substance that no right of way for the road leading to such bridge has been procured, or for the bridge. In determining this issue, it is necessary to examine the petition filed and presented to the board, praying for the calling of a special election to vote bonds for the erection of bridges over certain channels of the Platte river; also to examine the order made by the board calling a special election, submitting to the electors an opportunity to vote upon the bond proposition. The petition filed and presented to the board, signed by 72 freeholders of Maxwell precinct, contains the following:

"And said bonds to be approximately one-half of the entire cost of the construction of said bridges, as hereinbefore set forth, and the other one-half of the cost of construction of said bridges is to be borne by the United States government under the provisions of the federal aid law, according to the provisions of title 23 of the Code of Laws of the United States, chapter 1, known as the 'Federal Highway Act;' and, moreover, the state of Nebraska is to

construct a highway approximately on said section line, and to connect with said bridges on the north and south side of said streams, and permanently keep the same in repair; but should such federal aid not be granted, and the construction of said road by the state of Nebraska not be done and performed, then these bonds of said Maxwell precinct herein petitioned for to be ordered voted upon shall not be issued."

The notice or call of the special election to be held in Maxwell precinct, calling for the election to be held on the 27th day of December, 1928, contained the identical language as set forth in the petition upon which said call was based. It will be noticed both contain the provision that "the state of Nebraska is to construct a highway approximately on said section line." It is true, there is no highway there at the present time, but the bonds are conditional that there shall be one constructed by the state before the bonds can be issued; and, should said federal aid not be granted, then the bonds could not be issued. Before the bonds can become effective, two acts must be performed—one by the national government and one by the state. These bonds are not absolute bonds at the present time; they are simply conditional bonds, depending upon a future contingency as to whether or not they may ever be issued.

Appellants have cited and relied upon the case of *Brooks v. MacLean*, 95 Neb. 16, where the bonds under somewhat similar circumstances were held illegal; but that case was reversed because of a failure to set out definitely just how and where the money was to be expended, and that the electors were entitled to such specific information before being called upon to vote. Because such information was not furnished, the entire proposition was indefinite and uncertain. Hence, the facts in the *Brooks* case are materially different from those in the case at bar. In the case at bar, the information necessary to inform the voters how and where the money is to be expended is definitely set out. The elector is also informed where the state was to build its highway and where the bridge was to be constructed; also informed of the conditions under which said bonds can

be issued. There is nothing indefinite or uncertain about these items in the record.

It has been held by our court that a proposition to vote bonds is in the nature of a contract. *Wullenwaber v. Dunigan,* 30 Neb. 877; *Nash v. Baker,* 37 Neb. 713. Maxwell precinct, under the power given it by statute and the authority of the county board of commissioners, in order to carry out its part of such a proposition, voted these bonds. As the record stands at the present time, these bonds have no vitality; they are in embryo; they could not be enforced; they could not legally be recorded; the county could not legally sell or dispose of the bonds; the county commissioners have no authority to make any levy upon the property of said Maxwell precinct to pay the bonds or interest; they have been voted and are now held in abeyance until the conditions therein named are performed by the government and the state which would give them vitality. If these conditions are never performed, then said bonds will never be issued. The court feels that, under the record in this case, the objections raised by appellants are without merit.

The findings of the court herein renders it unnecessary to determine other charges set out in appellants' brief.

It is, therefore, the opinion and judgment of the court that the judgment of the district court is right, and that the same should be and is hereby

AFFIRMED.

ROSE AND GOOD, JJ., CONCUR IN RESULT.

STATE, EX REL. RICHARD C. MEISSNER, RELATOR, V. WILLIAM D. MCHUGH, JR., ELECTION COMMISSIONER OF DOUGLAS COUNTY, ET AL., RESPONDENTS.

FILED OCTOBER 20, 1930. NO. 27754.

1. **Elections: CANDIDATES: APPLICATION TO PLACE NAME ON BALLOT: SPECIAL PROCEEDING.** An application for an order requiring the election commissioner of Douglas county to file an acceptance of a nomination for county attorney by petition and to place relator's name on the ballot as a candidate for said office at the general election, November 4, 1930, made to a justice of the supreme court at chambers in Lancaster county,

under section 2119, Comp. St. 1922, as amended by section 3, ch. 108, Laws 1925, is strictly a proceeding under a special statute.

2. ———: ———: ———: CIVIL ACTION. It is such a special statutory proceeding as is contemplated by section 9525, Comp. St. 1922, and defined therein as a civil action. Said section also provides that such an action shall be commenced and prosecuted in conformity to the Code of Civil Procedure.

3. ———: ———: ———: VENUE. A civil action against a public officer, such as the election commissioner of Douglas county, must be brought in the county where the cause of action or some part thereof arose, as provided by section 8558, Comp. St. 1922.

Original Proceeding before a Judge of the Supreme Court, on the relation of Richard C. Meissner, against William D. McHugh, Jr., Election Commissioner of Douglas County, and another. *Petition dismissed.*

Patrick & Smith, for relator.

T. J. McGuire, contra.

DAY, J.

This is a special proceeding before a justice of the supreme court, under section 2119, Comp. St. 1922, as amended by section 3, ch. 108, Laws 1925, wherein Richard C. Meissner, as relator, seeks a summary order against the respondent, William D. McHugh, Jr., and Albert E. May, election commissioner and deputy election commissioner of Douglas county, respectively, to accept relator's acceptance of a nomination for county attorney of Douglas county by virtue of a petition filed and alleged to be in conformity to the provisions of section 2098, Comp. St. 1922, as amended by chapter 98, Laws 1927, and to place relator's name upon the official ballot as a candidate for said office to be voted on by the electors of said county at the election on November 4, 1930. The respondents filed a motion to dismiss, for that the justice of the supreme court had no jurisdiction over the subject-matter nor the parties in this case.

The above mentioned statute under which this special proceeding was instituted, in so far as applicable, is as

follows: "All certificates of nomination or nomination statements, which are in apparent conformity with the provisions of this article, shall be deemed to be valid, unless objections thereto shall be duly made in writing within ten days after the filing of the same. In case such objection is made, notice thereof shall forthwith be mailed to all candidates who may be affected thereby, addressed to them at their respective places of residence as given in the certificate of nomination or in the nomination affidavits of such persons, on file in that office. * * * The officer with whom the original certificate was filed, or who made an affidavit to the original nominating statement, shall, in the first instance, pass upon the validity of such objection, and his decision shall be final, unless an order shall be made in the matter by the county court, or by a judge of the district court, or a justice of the supreme court at chambers, on or before the second Wednesday preceding the election. Such order may be made summarily upon application of any party interested, * * * and upon such notice as the court or judge may require. The decision of the secretary of state, or the order of the judge or supreme court justice, shall be binding on all other county, municipal or other officers with whom certificates of nomination are filed."

The first question for determination is that of the jurisdiction of a justice of the supreme court over the subject-matter and the parties in this proceeding. That portion of the statute conferring jurisdiction upon a justice of the supreme court was incorporated in our statutes as early as 1891. The exact language has survived the changes of numerous amendments to our election laws since that time. See section 11, ch. 24, Laws 1891. The power and authority conferred by this provision is judicial and not quasi-political and administrative. Section 1, art. II of the Constitution, dictates: "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others except as hereinafter expressly directed or permitted." If, there-

fore, the authority conferred were quasi-political or administrative, it would be in violation of the above constitutional provision. It will be presumed that the legislature did not intend to violate the Constitution, and a statute will, if possible, be so construed as to make it conformable to the Constitution. *Enos v. Hanff*, 98 Neb. 245; *Burgess-Nash Bldg. Co. v. City of Omaha*, 116 Neb. 862. The conclusion is inevitable that the power conferred upon a justice of the supreme court by the legislative act is judicial. It has been so construed by our supreme court. *Porter v. Flick*, 60 Neb. 773; *State v. Hallowell*, 77 Neb. 610.

A county court, a district judge, or a justice of the supreme court at chambers, in a hearing in the matter of the validity of the objections to a certificate of nomination or nomination statements is sitting as a court inferior to the supreme court. This is strictly a special statutory proceeding, somewhat akin to mandamus. See opinion by Justice Good, *State v. Marsh*, 117 Neb. 579. Sometimes, according to the relief asked, it is in the nature of a mandatory injunction. See *State v. Marsh, ante*, p. 287, opinion by Chief Justice Goss. It could not be a mandamus action unless it be supposed that the legislature intended to confer upon county courts and judges of the district court and justices of the supreme court at chambers the power to issue peremptory writs of mandamus. The authority and power conferred by this statute upon a county court, a judge of the district court, and a justice of the supreme court, is concurrent and equal. The statute expressly provides that an order made by any one of these by virtue thereof shall be binding upon the other. A justice of the supreme court does not carry with him into the hearing of such a case any of the perogatives or powers or authority expressly and exclusively conferred by the Constitution upon the supreme court. In this special proceeding he sits as a tribunal inferior to the supreme court. Section 1, art. V of the Constitution, says: "The judicial power of the state shall be vested in the supreme court, district courts, county courts, justices of the peace, and such other courts inferior to the supreme court as may be created by law." Again, section

24, art. I of the Constitution, provides: "The right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied." Appeals are not taken from one court to another of equal jurisdiction. Consequently, a justice of the supreme court in this sort of proceeding must be sitting as an inferior court. It has been seriously urged that an order made under this statute is not subject to review. The intention of the law, in view of the constitutional provision herein cited, could not be to provide that orders in such a special and extraordinary procedure as this should not be subject to review. This proceeding has all the attributes of a civil action; but, even so, it is made a civil action by statute. In proceedings under a special statute, where a civil action is given, and where the statute designates by name or otherwise the kind of action, but does not prescribe the mode of proceeding therein, such action shall be prosecuted in conformity to the Code: "Where, by general or special statute, a civil action, legal or equitable, is given and the mode of proceeding therein is prescribed, this Code shall not affect the proceedings under such statute, until the legislature shall otherwise provide; but in all such cases, as far as may be consistent with the statute giving such action, and practicable under this Code, the proceedings shall be conducted in conformity thereto. Where the statute designates by name or otherwise the kind of action, but does not prescribe the mode of proceedings therein, such action shall be commenced and prosecuted in conformity to this Code; where the statute gives an action, but does not designate the kind of action, or prescribe the mode of proceeding therein, such action shall be held to be the civil action of this Code and proceeded in accordingly." Section 9525, Comp. St. 1922, the statute under which this special action was instituted, does not prescribe the mode of procedure, and it must therefore be prosecuted in conformity to the Code of Civil Procedure. The Code provides: "Actions for the following causes must be brought in the county where the cause or some part thereof arose: * * * Second. An action against a public officer, for an act done by him by virtue of or under

color of his office, or for any neglect of his official duty." Comp. St. 1922, sec. 8558. Section 8563, Comp. St. 1922, provides, with some exceptions, under which this action does not come: "Every other action must be brought in the county in which the defendant, or some one of the defendants, resides or may be summoned."

The respondents in this case are public officers and this civil action is brought against them by virtue of their office. The cause of action arose in Douglas county. There it was they refused to accept the relator's acceptance of a nomination by petition. This section of the statute was considered by the court in *Harrison v. Cheney,* 105 Neb. 821. The reason for the statute was so well stated in the opinion by Letton, J., that we quote it here: "Public officers should not be required to leave the county where the proper discharge of their official duties requires their presence to defend actions based on complaints as to the performance of such duties, except for cogent reasons." See, also, *Vennum v. Huston,* 38 Neb. 293, and *State v. Hill,* 38 Neb. 698. In *State v. Marsh,* 117 Neb. 579, and *State v. Marsh, ante,* p. 287, this question was not involved because the secretary of state was the respondent. In no case has a justice of the supreme court assumed jurisdiction of a case involving a public officer, requiring such officer to defend his official act in a proceeding under this statute outside of the county in which the cause of action arose. There is no cogent reason why under this proceeding public officers should be brought from remote counties of the state to defend their official acts before a judge of the supreme court sitting at chambers in the capitol, located in Lancaster county. Such a rule would require the county clerk of Sioux county, the county farthest removed from the capitol, to come here to defend his official act in refusing to accept a nomination petition of a candidate for the least important of the precinct offices. Even in this case from Douglas county, where the distance is not so great, many reasons suggest themselves to commend this statutory rule, where we take judicial notice of the fact that ten judges who are authorized to act, under the statute herein invoked, live there and con-

tinually perform their judicial duties within the county. Public officers and necessary witnesses are compelled to come a considerable distance with a consequent inconvenience. Moreover, the legislature, recognizing that it was against the public interest to compel public officers to defend their official acts in a tribunal far distant, have fixed the venue for such actions in section 8558, Comp. St. 1922, and their act is conclusive.

Questions relating to the ruling of the election commissioner as to the sufficiency of the petition for nomination of the relator were argued by the able counsel who presented this case. Could a signer of said petition remove his name by affidavit averring misapprehension and mistake in the inducement to sign after the time for filing a new petition had expired? And were electors, who were not registered as required in the city of Omaha, in order to vote, eligible to sign such a petition? Having reached the conclusion as to jurisdiction, which seems to us unanswerable, we decline to pass upon these questions. The desire of the relator to offer his services as county attorney to the electors of Douglas county at the general election to be held November 4, 1930, appeals to us as a laudable ambition. However, for the reasons heretofore stated, his petition must be dismissed.

PETITION DISMISSED.

WILLIAM WESLEY CARMICHAEL, APPELLEE, V. YANT CONSTRUCTION COMPANY, APPELLANT.

FILED OCTOBER 24, 1930. No. 27612.

APPEAL from the district court for Jefferson county: FREDERICK W. MESSMORE, JUDGE. *Affirmed in part, and reversed in part.*

Lester L. Dunn, for appellant.

E. A. Wunder, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY and DAY, JJ., and REDICK, District Judge.

PER CURIAM.

Plaintiff commenced this proceeding before the compensation commissioner to recover for injuries sustained while employed by defendant company. The commissioner allowed compensation at the rate of $15 a week for a period of 10 2/3 weeks, from which award plaintiff appealed to the district court for Jefferson county. The trial court entered judgment in favor of plaintiff for compensation for an additional 29 1/3 weeks at the same rate. Defendant has appealed from the order of the district court increasing the amount of compensation to be paid. Plaintiff has perfected a cross-appeal in which he assigns as error the failure of the trial court to allow the medical bill of Dr. J. T. Gallamore in the sum of $106, and also urges that a longer period of disability should have been allowed.

We have carefully examined the record and conclude that the judgment of the district court should be affirmed in so far as it increases the period of compensation from 10 2/3 weeks to 40 weeks, and that said judgment as to the allowance of the medical fee should be reversed and the cause remanded, with directions to allow the fee of Dr. J. T. Gallamore in the sum of $106.

AFFIRMED IN PART, AND REVERSED IN PART.

LOIS TOLIVER, ADMINISTRATRIX, APPELLEE, V. AXEL ROSTIN, APPELLANT.

FILED OCTOBER 24, 1930. No. 27310.

1. Trial: COMMON ENTERPRISE: QUESTION FOR JURY. "Whether a person riding in the automobile of another is engaged in a common enterprise with the latter is a question for the jury, where it is an issuable fact." *Judge v. Wallen*, 98 Neb. 154.
2. ———: INSTRUCTIONS. "Where two conflicting instructions are given on a question, one containing an incorrect, and the other a correct, statement of the law, the latter will not cure the former." *Koehn v. City of Hastings*, 114 Neb. 106.
3. Negligence: TRIAL: INSTRUCTIONS. It is erroneous to state in an instruction to the jury that a party is not guilty of contributory negligence if the jury find from the evidence certain facts,

when in stating such ultimate facts the instruction fails to state the facts correctly.

4. **Hearsay evidence** is inadmissible to prove the knowledge of one's friends and acquaintances as to whether he knew how to drive an automobile.

APPEAL from the district court for Douglas county: MARK J. RYAN, JUDGE. *Reversed.*

Kennedy, Holland, DeLacy & McLaughlin, for appellant.

Crofoot, Fraser, Connolly & Stryker and *James T. English, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

GOSS, C. J.

Plaintiff recovered a judgment for damages against the defendant for negligence in driving a car while intoxicated and thus causing the death of her intestate who was her husband and alleged to be a guest of the defendant. Defendant appealed.

Toliver and Rostin lived in Omaha and had been friends for years. Toliver was a barber and Rostin, who had been a barber, was engaged in the hail insurance business, which gave him considerable leisure time. On Tuesday, January 22, 1929, they went out to a place on the Platte river, 20 miles or more from Omaha, ostensibly to hunt, but apparently for such recreation and pleasure as they might derive from being in a hunting lodge or camp and from drinking intoxicating liquor. They used no guns and did not even take their guns out of the cases, but drank liquor fairly constantly while there. They went in Rostin's car and returned in the same car to the place where on the journey home the death of Toliver occurred. They remained at the shack until late Thursday afternoon, January 24, when they started home, Rostin driving. It was cold weather, below zero. There is evidence from which a jury might infer that they were not then so intoxicated that Rostin could not drive with ordinary care. He drove away from the camp through a gate and along a country

road for several miles, without mishap, to the Center street pavement, according to Rostin's testimony. He testified that, when they arrived at the paved road, Toliver said his feet were cold and he wanted to put on a pair of overshoes Rostin had in the back of the car; that Toliver sat on the running board and put on the overshoes and Rostin put a hunting coat over his leather coat; that while stopped at this point they "took a couple of drinks;" that Toliver said he would drive and drove from that point; that Rostin sat on the right side of Toliver "and he seemed to be getting along all right, kept in the road all right and the roads weren't slick, and, of course, I was pretty much under the influence of liquor, and we kept talking, and he was getting along all right and was going down hill, and the last I remember was when he hit the rail of the bridge, and I don't remember anything—of course, my head was cut above the temple, ribs fractured, and the last I remember is when I was up on the pavement flagging a truck, and the truck driver had his lights on, and stopped and come down and I asked for help, and I don't remember a thing, when the doctor examined me or anything, until the next morning I woke up at Elkhorn."

Whoever drove the car after they reached the pavement, it went several miles east on the pavement without disaster, but when it reached a bridge over a creek it crashed through the iron wing running at an angle of about 40 degrees from the main bridge rail on the south side and the car went down about 20 or 25 feet from the road level to the creek. It came to rest on its left side with the car pointing north. Toliver was later taken out alive but unconscious. He was sent in an ambulance to an Omaha hospital where he died that same night.

It appears that one Peterson was the truck driver who was flagged by Rostin at the bridge; and that before taking Rostin for help he changed Toliver's position in the car. Peterson was not produced at the trial nor was his evidence taken. The car was a coach or two door car and the front seats were said to be movable. From the position of Toliver when the testifying witnesses found him it might have led

to the inference that he was driving the car; but that was not a necessary conclusion in view of the distance the car went after it left the pavement, in view of the suggestion that Peterson moved him and lack of knowledge of how he found him, in view of the fact that he was badly hurt and could not get out of the car, and in view of the fact that Rostin does not know how he himself got out. Rostin might have been thrown out of the driver's seat, he might have crawled out of the right-hand door or through its window, which was broken, after the car came to rest.

We have sketched the facts at some length because appellant's first assignment of error is that the court should have sustained his motion for a directed verdict for insufficiency of the evidence. The proximate cause of the accident, as alleged in the petition and as the court instructed the jury, was restricted definitely and solely to the intoxication of Rostin while driving his car with Toliver as his guest at the time Toliver was injured. There was evidence that he invited Toliver to go, that he furnished the car, the gas and a new battery to supplant the old one that froze up in camp, and that he drove the car all the time according to his own testimony, except after they reached the pavement on the return journey. He himself testified that he "was pretty much under the influence of liquor;" so if Rostin was driving, as we think the jury had a right to find, though contrary to his testimony, then his confessed intoxication may have furnished the proximate cause of the injury. The testimony warranted the submission of the issue as to whether Toliver was Rostin's guest with Rostin driving the car when the car went through the bridge, and therefore the court could not say as a matter of law that there was no evidence upon which to submit this issue; and to direct a verdict on the ground that they were engaged in a joint enterprise would, in the face of the evidence, usurp the functions of the jury. That was an issuable fact and so a question for the jury. *Judge v. Wallen,* 98 Neb. 154. Whether defendant was so intoxicated as to subject Toliver to contributory negligence sufficient to defeat a cause of action was another question for the jury which we think

the court was justified in submitting to the jury. On the whole we find no error in the refusal of the court to sustain defendant's motion for a directed verdict.

A more serious question is presented by the second assignment charging error in the giving by the court of instruction No. 16, as follows:

"However, if you believe from the evidence that Toliver knew that Rostin had been drinking intoxicating liquor and was to some degree intoxicated when they left the hunting shack, but that said defendant Rostin took charge of his automobile at the beginning of the return journey, and operated the same in a careful and prudent manner for several miles, then and in that event the deceased was not guilty of contributory negligence in remaining in the automobile and his knowledge of Rostin's condition will not bar a recovery on the part of the plaintiff."

Instructions Nos. 9 to 15 given by the court had been requested by defendant. The court had appended to instruction No. 9 these words: "This instruction and the six following instructions are to be considered in connection with instruction No. 16." The seven instructions stated propositions of law based on finding of fact under which, if found by the jury, plaintiff could not recover. The court evidently intended instruction No. 16 given by himself on his own motion to present the other side of the shield and to be a sort of buffer or cushion for the seven instructions preceding it. But we think the court inadvertently overlooked a portion of the evidence, to wit, that, after Rostin had driven "several miles" and no accident had happened by reason of Rostin's intoxication as driver, they stopped to put on the overshoes and coat and then drank some more, after which, while he testified he was not driving, Rostin further testified he "was pretty much under the influence of liquor." By this instruction the court told the jury as a matter of law that, if they found the facts stated in the instruction, but incompletely stated by the court under the evidence as we have shown, then in that event Toliver was not guilty of contributory negligence. Moreover, the instruction conflicts with the portion of instruction No. 11, given by the

court, as follows: "Or if you find that in the course of the return journey, defendant became so intoxicated as to be incapable of properly operating the car, and that Toliver knew it, or ought to have known it, and yet voluntarily continued on as a passenger in the car, then you are instructed that plaintiff cannot recover in this case."

It was, if anything, more important to submit to the jury the question of Toliver's contributory negligence after they entered upon the pavement than during the several miles they had traveled before arriving at the paved road. It was a question of fact for the jury to determine without the court taking from the jury as a matter of law the effect, on the issue of contributory negligence of Toliver, of the evidence of the drinking when they stopped at the pavement and of the driving and condition of Rostin during the last several miles, if they found he drove the car then. This error in instruction No. 16 was not cured by instruction No. 11, which refers to the whole of the return journey, because the two instructions were conflicting. We have said: "Where two conflicting instructions are given on a question, one containing an incorrect, and the other a correct, statement of the law, the latter will not cure the former." *Koehn v. City of Hastings,* 114 Neb. 106. We are of the opinion that this error requires a reversal of the judgment.

One of the pivotal issues of fact was whether Rostin was driving the car, as plaintiff alleged, or whether Toliver was driving, as Rostin testified. On that issue Mrs. Toliver and various acquaintances testified that they never knew him to drive. Dennis Ryan, a reputable witness and long time friend of Toliver, testified along this line and detailed a circumstance indicating that if Toliver had been able to drive he would have done so. He was then asked this question: "What was the fact as to whether or not it was generally known among his friends and acquaintances, as to whether or not Toliver knew how to drive a car?" Over objection he answered: "Well, it was generally known amongst his friends, and everybody that knew him, that he didn't know how to drive a car." A motion to strike the answer as hearsay was overruled, the court saying: "Oh, I think a man

associated with him for years could testify to that. The answer may stand."

It seems to us that the trial court misunderstood the meaning and effect of the question and answer. The witness had already testified to his own knowledge as to Toliver driving a car, but here he was permitted to give, not only his own conclusion as to whether Toliver could drive, but to state the general knowledge of "everybody that knew him" that he did not know how to drive a car. There was no opportunity to cross-examine everybody who knew Toliver and their evidence thus permitted to be given by this witness was purely hearsay or reputation.

Reputation is not a fact, but is hearsay. 3 Wigmore, Evidence (2d ed.) sec. 1609. Unless it is received under the exceptions permitting hearsay evidence it is of course inadmissible. We are not advised in what way this inquiry comes under any exception. Whether or not Toliver could drive was a current fact. Defendant produced one witness beside himself who testified that Toliver had driven a car and they submitted themselves to cross-examination. Plaintiff proved, as heretofore stated, by various witnesses who knew him intimately that they never knew him to drive a car. It was a question for the jury to pass upon, uninfluenced by hearsay evidence. While this hearsay evidence was, in a sense, cumulative, as argued by the plaintiff, yet we cannot agree with plaintiff's argument that it might not have been prejudicial. On another trial it should not be admitted.

Appellant argues that instruction No. 4, given by the court, containing the general propositions required to be found by the jury to be established by the plaintiff by a preponderance of the evidence, is erroneous because it fails to be coupled with an instruction as to contributory negligence. He cites *Bauer & Johnson Co. v. National Roofing Co.*, 107 Neb. 831. In that case no complete instruction on comparative negligence was given. It is true that the second paragraph of the syllabus suggests, in effect, that when the contributory negligence of the plaintiff may be a defense it should be submitted to the jury "in the same in-

struction" as that reciting the elements required to be proved by a preponderance of the evidence. It would have been better had the writer said "in the same instructions," for that is now the effect of our holdings. *Cornforth v. Graham Ice Cream Co.*, 109 Neb. 426. In the latter case the court referred to *Bauer & Johnson Co. v. National Roofing Co., supra,* and held that it was not controlling of the case under consideration because of difference in facts and instructions. In commenting on a situation much like that here the opinion in the *Cornforth* case says: "It would have been better to qualify it by the further statement, 'subject, however, to the defense of contributory negligence, which is hereinafter explained,' or other language conveying the same idea, but to omit this is not reversible error." So we conclude that the general instruction on the elements to be proved by a preponderance of the evidence was not erroneous where later in the instructions an admittedly correct instruction on comparative negligence was given.

For the reasons stated, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

AMERICAN STATE BANK OF SPRINGFIELD, APPELLEE, V. DAN P. PHELPS ET AL., APPELLEES: EASTLAKE STATE BANK OF EASTLAKE, COLORADO, INTERVENER, APPELLANT.

FILED OCTOBER 24, 1930. No. 27360.

1. **Appeal**: BRIEFS: ASSIGNMENTS OF ERROR. Where appellant's brief is challenged for the first time in oral argument on the merits of the appeal, because it does not contain a formal assignment of error, a clear, concise statement of the only question presented for review, if contained in the brief, may be treated as such an assignment.
2. ———: REVIEW. The supreme court, at its option, has statutory authority to consider on appeal a plain error not specified in appellant's brief. Comp. St. 1922, sec. 9144.
3. **Garnishment.** An heir's distributive share of decedent's estate, as decreed by the county court, is not subject to garnishment in

the hands of the administrator under process from the district court. *Scott v. Rohman*, 43 Neb. 618.

APPEAL from the district court for Sarpy county: JAMES T. BEGLEY, JUDGE. *Reversed and dismissed.*

D. O. Dwyer, for appellant.

Patrick & Smith and *Nickerson & Nickerson, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and REDICK, District Judge.

ROSE, J.

Plaintiff commenced this proceeding in the district court for Sarpy county to garnish in the hands of an administrator an heir's distributive share of decedent's estate as determined by the county court of Sarpy county in an order of distribution.

The American State Bank of Springfield, plaintiff, recovered in the district court for Sarpy county a judgment for $3,635.98 against Dan P. Phelps, defendant, and afterward procured from the same court a process in garnishment directed to William J. Morrison who, by order of the county court, was administrator of the estate of Julia Ann Phelps, deceased. The purpose of the garnishment was to require Morrison, the administrator, as garnishee to apply on the judgment in favor of plaintiff in the district court defendant's distributive share of the Phelps estate as determined by the county court. The answer of the garnishee contains pleas that he has in his hands $190.67 as the distributive share of defendant in the Phelps estate, as decreed by the county court; that the fund is in the custody or keeping of the law, subject to the order of the county court, and that consequently the district court is without jurisdiction to garnish the money in his hands as administrator; that the Eastlake State Bank of Eastlake, Colorado, claims the fund by assignment, and threatens to sue garnishee on his bond as administrator, if he disburses the fund pursuant to the order of the district court. The Eastlake State Bank of Eastlake, Colorado, intervened in the garnishment pro-

ceeding and challenged the jurisdiction of the district court to garnish the distributive share of defendant in the hands of the administrator, as decreed by the county court, being the court of original jurisdiction in the settlement of estates of deceased persons.

Upon a trial of the issues the district court overruled the objection to jurisdiction and ordered the garnishee to pay $190.67, the fund in controversy, to the clerk of the district court to apply on the judgment in favor of plaintiff and against defendant for $3,635.98. Intervener appealed.

Upon appearing at the bar to discuss the merits of the case, counsel for plaintiff and appellee challenged orally for the first time the brief of intervener and appellant on the ground that it did not contain a formal assignment of error. The challenge is overruled for the following reasons: In the brief, following a statement of the case, it is clearly and concisely stated that the only issue is the jurisdiction of the district court to subject the administrator in the county court to the process of garnishment from the district court. While this is not formally designated an "assignment of error," it may properly be treated as such, under the circumstances. Furthermore, the supreme court, at its option, may consider a plain error not specified in appellant's brief. Comp. St. 1922, sec. 9144.

Did the district court have jurisdiction to order the administrator in the county court to apply on the judgment in favor of plaintiff in the district court the defendant's distributive share of decedent's estate? The question does not seem to be an open one in Nebraska. Recognizing a conflict of authority on this subject and citing cases, it was said in *Scott v. Rohman*, 43 Neb. 618, 628:

"The question presented by the record to be determined is whether a judgment debtor in the district court of this state is liable to garnishment proceedings issued out of the county court. There is an irreconcilable conflict in the authorities bearing upon the subject. Some decisions are to be found in the books which assert that a judgment debtor in one court may be garnished on process issued out of another court. * * * The majority of the cases, and the more

recent decisions, sustain the doctrine that a debt reduced to a judgment is liable to garnishment when the process of garnishment issues from the same court, but not otherwise."

In that case the general rule adopted was stated in this language:

"A judgment debtor is liable to the process of garnishment, when the two actions are brought in the same court, but not otherwise."

The view thus expressed is supported by the weight of authority as shown by cases collected in a note in L. R. A. 1917D, 1139. The opinion in *Scott v. Rohman*, 43 Neb. 618, was reported in 1895 and has never been modified or overruled. The necessity of avoiding a conflict of judicial authority was given in the opinion as a reason for the rule adopted. In this connection plaintiff argues that the principle quoted does not control the present controversy, saying:

"In the case at bar, the interest of the debtor had been definitely fixed by the final decree of the county court of Sarpy county. Nothing further remained to be done by the county court and a conflict of judicial authority was not possible."

The position thus taken is untenable. The county court in the exercise of original jurisdiction ordered the administrator to turn over to defendant as an heir the latter's distributive share of decedent's estate. The order was a judgment against the administrator. It adjudicated his indebtedness to defendant, an heir. There was no appeal. The judgment was unsatisfied when the process in garnishment was issued. At that time the county court had jurisdiction to enforce payment of its own judgment by execution against the administrator. *Lydick v. Chaney*, 64 Neb. 288. The orders in the different jurisdictions were conflicting. The county court ordered the administrator to pay the fund in controversy to defendant and the district court ordered him to pay the same fund to plaintiff. The decision of the district court in the case at bar is at variance with the established rule in Nebraska. The judgment from

which the appeal was taken is therefore reversed and the proceeding in garnishment dismissed at the cost of plaintiff in both courts.

REVERSED AND DISMISSED.

FRANK HARMER V. STATE OF NEBRASKA.

FILED OCTOBER 24, 1930. No. 27553.

Evidence examined and *held* insufficient to sustain conviction.

ERROR to the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Reversed and dismissed.*

D. W. Livingston, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Clifford L. Rein, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

EBERLY, J.

The plaintiff in error, hereinafter referred to and designated as the defendant, was convicted in the district court for Otoe county of unlawfully stealing chickens of the value of $25, the property of one Wiebusch. It is charged that this offense was committed on the 25th day of January, 1930. From the conviction and the sentence imposed thereunder the defendant prosecutes error.

The record discloses that by plea in abatement, duly presented at the time of his trial in the court below, the defendant challenged the sufficiency of the evidence heard by the examining magistrate at the time of the preliminary examination as being wholly insufficient to support the finding that a crime had been committed and that there was probable cause to believe that the defendant committed it. The state demurred to this plea and its demurrer was sustained by the district court. On the trial of the case, at the conclusion of the state's evidence, the defendant moved for a directed verdict based upon the insufficiency of the evidence presented by the state to justify conviction, which

motion was overruled. At the conclusion of all of the evidence a similar motion was again presented and again denied by the district court.

While defendant contends that certain other errors were committed by the trial court, he still relies upon his contention that the evidence is wholly insufficient to sustain the conviction, and it is thought that a proper determination of this question will render further discussion of the case before us superfluous.

It appears from the record that the defendant is 45 years of age, and at the time of the trial had resided in Otoe county and had been engaged in farming therein during his entire life. He owned the quarter section which he was farming and on which he resided. This land is situated seven miles south and two and one-half miles west of Avoca. The home of the complaining witness from which it is alleged the defendant stole the chickens is situated four miles east and one-half mile north of Otoe. Highway No. 50 connects Syracuse, Otoe, Avoca, and Weeping Water. The home of the complaining witness is situated east of this highway, and is approximately six miles east of the home of the defendant.

On the Wiebusch farm, on the date set forth in the information charging the offense, there were two chicken houses of approximately equal size, one situated 300 or 400 feet north of the residence thereon and the other an equal distance east of the house. On this farm during the season of 1929 there had been raised light Brahmas, Rhode Island Reds, White Rocks, Buff Orphingtons, and Minorcas, as well as mixed chickens. Some of each of the varieties named were kept in each chicken house with the possible exception of the Minorcas. There was no obstruction, such as fences, etc., which in any manner prevented the chickens of the two houses from passing and repassing between the same and intermixing.

At the trial the state introduced the evidence of the agent in charge of the Beatrice Creamery Company station at Weeping Water, Cass county, Nebraska. A part of the business of this firm at that point was dealing in poultry.

The agent of this company testified that the defendant on January 25, 1930, sold and delivered to him 19 light Brahma chickens which are now claimed as the property of the complaining witness. As to the time of day when this transaction occurred he testified: "Why, it was late afternoon, between 4 and 6 o'clock; somewhere along there. I never paid much attention to the time." On cross-examination on this subject this witness further stated with reference thereto: "Q. What time in the evening did you say he delivered those chickens to you? A. Oh, it was between 4 and 6 o'clock. Q. Between 4 and 6. You testified in the lower court, did you not? A. Yes, sir. Q. At that time was this question asked you and this answer given by you: (Question) 'You told the sheriff that he was at your place last Saturday afternoon sometime between 5 and 5:30?' (Answer) 'Yes, sir.' Was that question asked, that answer given? A. I think it was. Q. Was this question asked you, and this answer given by you in the lower court: (Question) 'Was it before dark?' (Answer) 'Yes; it was just growing dusk when he was there, when he left.' Is that correct? A. Yes, sir. Q. And that was the time that he came there? A. As near as I can remember. Q. Whatever the hour was, it was growing dark? A. Yes, sir."

Mrs. Wiebusch, as to the vital facts of the situation, appears as the state's sole witness. Her testimony supports the conclusion that on Saturday, January 25, 1930, she had been at home all day. She states that around 7 o'clock p. m. that day she, with her husband and family, left their home and proceeded to the village of Otoe in their automobile. They returned home "around 10 o'clock." At that time they discovered an automobile standing north of the house without lights. When the automobile in which she and her family were riding approached near their home the strange car started north along a gravel highway there situated. The witness, with her husband and children in the automobile followed rapidly until they got close enough to light up and read the numbers thereon, which numbers, she testified, were the numbers on the defendant's car. On

cross-examination she stated that it was "after 10 o'clock" when they arrived home from chasing the car, and that they had followed the car along the gravel road leading north "a good mile;" that they discovered there was a single man in the car, but could not recognize him; that they heard no chickens in the car which they followed, and in fact there is no evidence that chickens were contained in this car at that time. It also cannot be ascertained with any certainty whether this strange car was, at the time of its discovery by the complaining witness, on the gravel road, in the yard of the home, or in the vicinity of the north chicken house. Mrs. Wiebusch also testified that she had counted the chickens in the north chicken house two weeks before Christmas and at that time she had 165 therein; that these chickens were not counted again until Sunday, January 26, 1930, and at that time she found she had 112; that on the 27th of January, 1930, she and her husband, and Mr. Rich, the sheriff, went to Weeping Water, where she saw the 19 light Brahmas at the Beatrice Creamery Company station, which they took home with them when they returned. On arriving at their home these 19 light Brahmas were turned out about 50 feet southwest of the north chicken house and "fourteen of them (went) right straight to the scratching pen and five stopped by a little pile of hay and started scratching there." On cross-examination this witness testified that she did not know how many chickens she had raised in 1929, did not know how many of each variety of chickens she had; that there were no markings of any kind on the chickens recovered from Weeping Water, other than that of breed, except a band on one rooster's leg; that she did not know who put the band on and did not know where it came from; that she did not miss this rooster with the band on until Monday when they brought him back with the other chickens from Weeping Water; that she had never seen any Brahma chickens at any time save and except those raised by her on her own place, but because the chickens found at Weeping Water looked like hers they were hers; that she did not know how many Brahma chickens she raised in 1929,

and did not know how many Brahma chickens, out of the 165 she counted two weeks before Christmas, were in the north chicken house; that she is willing to and did swear that the large rooster with the band is her property because of the size, actions, comb, and because her chickens had white diarrhea and she observed that one of the light Brahmas was afflicted in like manner when she examined the nineteen at Weeping Water. She details at some length the actions of the nineteen chickens when returned to her home place and there turned loose. There is no evidence of any kind corroborating the complaining witness in her statements. Although the evidence discloses that the husband was with her at the time of the discovery and pursuit of the strange car and the time that the numbers were ascertained, and he was a witness sworn at the trial, his testimony is limited to the statement that he was the husband of Mrs. Wiebusch, that he had sold no chickens since two weeks before Christmas and had given no one permission to take any of his chickens away. There is no evidence in the record given at the trial of the case in the district court as to how many chickens were on the farm at the time the chickens were counted in the north chicken house two weeks before Christmas. There is no evidence as to how many light Brahma chickens were on the farm either at that time or on the 26th of January, 1930, when the chickens in the north chicken house were again counted and found to be no more than 112, and that she had never missed any chickens out of a flock of 165 until January 26, 1930.

The defendant wholly denied the crime charged, and further testified that from 350 to 400 chickens were raised on his farm in 1929, a part of which consisted of light Brahma chickens, and the chickens in controversy by him sold were raised on the farm and were marketed by him on Saturday, January 25, 1930; that these chickens were sold and delivered to the Beatrice Creamery Company station between 5 and 6 o'clock on that day; that neither he nor his car were at the complaining witness' home on the day or evening of January 25, 1930. As to the raising and

possession of light Brahma chickens on his farm prior to the 25th day of January, 1930, the defendant is fully corroborated by the evidence of two witnesses, one of whom noticed the band which was on the leg of a Brahma rooster. These witnesses were not in any manner impeached. Defendant also accounts for his whereabouts during the entire evening of January 25, 1930, by evidence which, if believed, would fully establish the fact that he was not on that day, especially in the evening, at or near the home of the complainant. None of this evidence is in any manner contradicted, save and except by the uncorrobrated evidence of the complaining witness, and that limited to the fact that at about 10 o'clock in the evening of January 25, 1930, a car bearing defendant's license number was discovered by her and her husband as hereinbefore recited.

Without further discussion, it may be said that the identification of the chickens by the uncorroborated evidence of the complaining witness is not satisfying, and the record taken as an entirety certainly creates more than reasonable doubt on this feature of the case. On one point, however, there can be no question, for all witnesses agree, and that is the chickens were sold and delivered at Weeping Water, some distance from the home of the complaining witness, between 4 and 6 o'clock p. m. on Saturday, January 25, 1930. The complaining witness and her family were home, and, so far as the record before us discloses, no opportunity was afforded any one to remove the chickens therefrom until after 7 o'clock p. m. when she and her family left for Otoe. The only evidence connecting the defendant with the situation is the evidence that she saw an auto carrying his license number on the premises about 10 o'clock p. m., Saturday, January 25, 1930. There is no evidence of any chickens missing until disclosed by the count made Sunday, January 26, 1930. It certainly must be conceded to be a physical impossibility for the defendant to have sold at 6 o'clock p. m. chickens which could not have been stolen by him except between 7 and 10 o'clock p. m. on the same day.

The commission of a crime cannot be assumed; it must be established by due proof. All of the pertinent transactions and matters referred to in the record took place on the 25th of January, 1930, or thereafter; so we are limited to the consideration of the evidence as to what occurred on that day only. In this view of the case, there is no question that the evidence conclusively establishes the innocence of the defendant and is wholly insufficient to sustain the verdict of guilty, and the district court erred in denying the defendant's motion for a directed verdict.

It therefore follows that the judgment herein must be and hereby is reversed, the information dismissed, and the defendant discharged.

REVERSED AND DISMISSED.

LOUIS O. MUHLEISEN, APPELLEE, V. ARTHUR J. KRUEGER, APPELLANT.

FILED OCTOBER 31, 1930. No. 27398.

Waters. The rule in *Town v. Missouri P. R. Co.*, 50 Neb. 768, examined, approved, and followed, this case not coming under the exceptions to the general common-law rule as to surface waters suggested therein, and as announced in *Flesner v. Steinbruck*, 89 Neb. 129, and *Aldritt v. Fleischauer*, 74 Neb. 66.

APPEAL from the district court for Adams county: LEWIS H. BLACKLEDGE, JUDGE. *Reversed and dismissed.*

Bernard McNeny, for appellant.

Charles E. Bruckman, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and REDICK, District Judge.

DAY, J.

This is a suit in equity to enjoin the defendant from interfering with the flow of surface water upon his land from the adjoining land of the plaintiff. It appears conclusively from the record in this case that there is a low place or sag in the land that holds water after a heavy rain or melting snow at a point on the division line between the farms

of the parties to this litigation; that the defendant has threshed his grain, piling the straw therefrom in the depression on his side of the division line, and in addition thereto has put in some planks and piled the straw behind them; that the sag in question is not a natural watercourse, a creek or a draw; that to the point in controversy the plaintiff's land slopes gradually down from the crest of the hill 2,000 feet distant; that the land appears to be level and the slope so gradual and regular that the drainage of said land does not converge upon the land of the plaintiff into a depression or draw and does not run into the sag in a well-defined stream; that the drainage of the land is to the northeast upon the land of the defendant; that the survey of the plaintiff's land introduced in evidence shows that a line run from the point of the division line where the sag in question is located, except at or near the division line, has a higher altitude than similar places on the land 200 feet equidistant on either side thereof.

Upon this state of the facts the court found in substance that the plaintiff had the right to the escape of surface waters from his land in the natural course of drainage thereof, without unreasonable interference or impediment by the acts of the owner of the adjoining land, and that the defendant in maintaining a dam of straw and planks near the division line was unlawfully obstructing the natural drainage of the land. If by the words, "in the natural course of drainage," as used in the opinion of the trial court, he meant a depression or draw which constituted a watercourse, as contemplated by the law, then the evidence in the record in this case does not sustain the finding. Watercourse is defined by section 1719, Comp. St. 1922, as follows: "Any depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook, shall be deemed a watercourse." Whether or not water is passing in a natural drain is a question to be determined from the facts of the case. In this case there is no converging of the water into a single stream which has entered a well-defined drainage ditch. The evidence of the county surveyor, including the plat

which he prepared and which was received in evidence, absolutely negatives any contention of a natural drain or watercourse. Thus, also, does the photograph of the point of controversy from an examination of which no one could determine where the water would flow in the case of rain or melting snow; so we are forced to the conclusion in this case that we have what is called in the books, "diffused surface water," which does not converge into a natural drain.

It appears that the trial judge applied the rule of the civil law, which is: "As between the owners of higher and lower ground, the upper proprietor has an easement to have surface water flow naturally from his land onto the land of the lower proprietor, which is subject to a corresponding servitude, and hence the lower proprietor has not the right to obstruct its flow and cast the water back upon the land above; but this applies only as to water arising from natural causes, as from the falling of rain or the melting of snow, and water arising from springs and draining off without a defined channel." 40 Cyc. 640. But this rule is not the law of this state. Here, the doctrine of the common law in regard to surface waters is, with some exceptions, in force and controls. *Town v. Missouri P. R. Co.*, 50 Neb. 768. According to the common-law rule adopted by our court, no natural servitude exists in favor of the superior or higher land as to surface water, such as falls or accumulates by rain or the melting of snow. Therefore, the owner of the lower tenement may lawfully obstruct or hinder the flow of this water and in so doing hold it back or turn it off of his own land without liability therefor. 27 R. C. L. 1143, sec. 74. In the text above cited it is further explained that the gist of the rule is that one may do as he pleases with his property regardless of the effect of surface water. In *Town v. Missouri P. R. Co., supra,* this court said: "Surface waters may be controlled by the owner of the land on which they fall or originate or over which they flow. He may appropriate to his own use all that falls or comes on his land and refuse to receive any that falls or originates or flows on or over adjoining pro-

perty." This is the definition of the common-law rule as adopted by this state. The court further explained the exceptions to the rule as recognized by this court, in the following language: "Surface waters may have such an accustomed flow as to have formed at a certain place a channel or course, cut in the soil by the action of the water, with well-defined banks, and having many of the distinctive attributes of a watercourse; and though there are no exceptions to the general rule except from necessity, this may constitute an exception, and if the flow is stopped by the erection of an embankment across and in the channel, some provision may be necessary for the allowance of the regular flow of the surface waters." This same doctrine was enunciated in *Jacobson v. Van Boening,* 48 Neb. 80, and *Morrissey v. Chicago, B. & Q. R. Co.,* 38 Neb. 406.

In *City of Beatrice v. Leary,* 45 Neb. 149, the court stated the common-law doctrine, but laid down the exception that the proprietor may not so use his own property as to unnecessarily and negligently injure his neighbor, and that he might do what was reasonably necessary, unless he was negligent in the manner of its execution. This case involved the damming of a natural drain, a draw, by the grading and paving of a street. In *Flesner v. Steinbruck,* 89 Neb. 129, the court decided that the upper proprietor can change the course of drainage upon his own premises by the use of ditches which permit the water to flow without appreciable increase in volume upon the servient estate *in a natural drain* where it would have appeared if the ditches had not been constructed. This case is not a modification of the rule as laid down in *Town v. Missouri P. R. Co., supra,* but is one of the exceptions recognized therein. The matter was before the court in *Aldritt v. Fleischauer,* 74 Neb. 66. This was another case where the owner of land drained ponds of a temporary character into a natural surface-water drain on his own property, and through this drain over the land of the lower proprietor. This case lays down the rule that natural drainage channels cannot be obstructed.

We have examined the cases cited by the appellee in this case, *Boyd v. Conklin,* 54 Mich. 583; *Aldritt v. Fleischauer,* 74 Neb. 66; *Roe v. Howard County,* 75 Neb. 448; *Flesner v. Steinbruck,* 89 Neb. 129; and *Mapes v. Bolton,* 89 Neb. 815. In all of the cases cited there was the question of putting an obstruction across a natural drainage ditch, such as a draw or a well-defined ditch. This is obviously not the situation in the instant case. We have examined the record with great care and the evidence does not disclose that the defendant is at the present time negligent in the filling up by straw and the maintaining of what is alleged to be a dam as it exists at the present time. The conditions surrounding the location in this controversy are such that the defendant under the law of this state has a right to protect himself against surface waters such as are disclosed by the record in this case running upon his land from the upper land.

The defendant might so reconstruct his dam at some future time that he would unnecessarily and without good reason damage the land of the plaintiff, but in the present state of the record we conclude that the trial court was in error in granting the injunction. The judgment of the lower court is therefore reversed and the cause dismissed.

REVERSED AND DISMISSED.

STRANG STATE BANK, APPELLANT, V. UNION LUMBER COMPANY: SARAH S. BOLTON ET AL., EXECUTORS, INTERVENERS, APPELLEES.

FILED OCTOBER 31, 1930. No. 27066.

1. **Appeal.** Findings of fact made by a court in the trial of an action at law will not be disturbed by this court on appeal if there is competent evidence to support the findings and judgment of the trial court.
2. **Bills and Notes: ALTERATION: BURDEN OF PROOF.** Receipt in the following language: "Received of M. Bolton, note of $500 Union Lumber Company, same being property, however, of M. Bolton. (Signed) Len J. Davis, Fred Messman." *Held,* proof that such receipt had been detached, after delivery, along a perforated line from another instrument is not evidence of alteration or

mutilation of such receipt, and does not place the burden upon the holder thereof to explain circumstances of detachment, in the absence of evidence that such receipt and instrument from which it was detached were intended to be construed together.

3. ———: INDORSEMENT: BURDEN OF PROOF. In an action on a promissory note against the maker by plaintiff, who claims to be the owner of said note by virtue of the indorsement of payee's name on the back thereof, and the defendant by his answer specifically denies that plaintiff is the owner of said note, the burden is upon the plaintiff to prove the genuineness of the alleged indorsement of the name of deceased payee.

APPEAL from the district court for Nuckolls county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

C. M. Skiles and *I. D. Beynon,* for appellant.

Perry, Van Pelt & Marti, C. C. Cartney and *John J. Wilson, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and LESLIE, District Judge.

LESLIE, District Judge.

A prior hearing was had in this case before the commission and an opinion rendered affirming the judgment of the district court. A rehearing was granted, however, and the case is now before this court for decision.

The appellant, Strang State Bank, hereafter referred to as plaintiff, brought this action in the district court for Nuckolls county against the Union Lumber Company, defendant, on a promissory note executed by said lumber company to one Monroe Bolton, now deceased. It is claimed by plaintiff that Monroe Bolton, payee, transferred the note by indorsement and delivery to the plaintiff, and that the plaintiff is the owner and legal holder thereof. The defendant, by its answer, admits the execution of the note, but denies that plaintiff is the owner thereof. The executors of the estate of Bolton, payee, intervened, and by answer and cross-petition deny the averments of the plaintiff's petition, except as to the execution of said note, and claim that the estate of Monroe Bolton, payee, is the owner of the note. A jury was waived and at the conclusion of

the evidence the court found for interveners and dismissed plaintiff's action against the defendant.

Ten assignments of error are relied upon by the plaintiff, but we need consider but four of these: (1) That the decision is not sustained by sufficient evidence; (2) that the court erred in admitting exhibit 2 offered by the interveners, for the reason that it showed on its face it had been altered and mutilated; (3) that the court erred in sustaining objections of the interveners to evidence offered by the plaintiff; (4) that the court erred in admitting evidence tending to show that the indorsement on the back of the note in question was not the genuine indorsement of M. Bolton, the payee named in the note.

The second and third assignments above will be considered together since they relate largely to exhibit 2, which it is claimed by the plaintiff the court improperly received in evidence. Exhibit 2 is as follows:

"Detach March 15, 1927.

"Received of M. Bolton, note of $500 Union Lumber Company, same being property, however, of M. Bolton.

"(Signed) Len J. Davis,
"Fred Messman."

It definitely appears that it was detached from another piece of paper along a perforated line at the top made by a typewriting machine. The plaintiff objected to the trial court receiving this exhibit in evidence upon the theory that it had been altered and mutilated after it was given by the officers of the bank, and that it was not shown that the note mentioned in the exhibit was the note sued upon. Witness Messman, cashier of plaintiff bank, testified as follows: "Q. 611. I will ask you to state whether exhibit 2 there, those signatures were on there when you saw them in that condition, whether that instrument was in that condition when those signatures were placed on there? A. The way I recollect it, this has been detached from another part. Q. 612. There was another part on above? A. On above, yes. Q. 613. And did that other part refer, as you remember it, to this note? Objection by Mr. Perry. Defendants object as not cross-examination. Overruled. Ex-

ception. A. Yes, sir. Motion by Mr. Beynon. Plaintiff moves to strike the testimony relative to exhibit 2 and to strike the exhibit from the record for the reason that the witness has testified that it was not in the form in which he signed it and it had been mutilated, detached, and a part of it isn't here and introduced in evidence. Objection by Mr. Perry. Defendants object to the motion as not cross-examination, and incompetent under section 8836. Sustained. Exception. Q. 614. Mr. Messman, you have testified, if I correctly understood it, that when you signed that exhibit 2 there was another part to it which doesn't appear there now? A. That is the way I remember it. Q. 615. Did you detach that, did you cut that other part off? Objection by Mr. Perry. Defendants object as immaterial, incompetent, not proper cross-examination. Sustained. Exception. Q. 616. At the time this instrument was executed, was it your intention that a part of it should be detached from this which appears here in court at the present time? Objection by Mr. Perry. Defendants object as not proper cross-examination, self-serving, incompetent, immaterial, not tending to prove or disprove any issue in this case, and further it is not admissible under section 8836. Sustained. Exception. Q. 617. I notice the top of this exhibit in typewriting, 'Detach.' Do you recall, Mr. Messman, whether or not that was on this slip of paper on which you signed, at the time you signed it? A. This 'detach?' Q. 618. The word 'detach?' A. I don't remember." The foregoing is all the material evidence we find in the record that has to do with the claimed alteration or mutilation of exhibit 2.

We think the trial court should have sustained the defendants' objection to interrogatory No. 613 asked by the plaintiff's counsel, as the instrument itself, from which it is claimed exhibit 2 was detached, is the best evidence of what its contents are. If it was unobtainable, plaintiff's counsel should have shown this and laid a foundation for oral testimony. This was not done, and the court should have, and probably did, ultimately disregard the answer of the witness. But, aside from this, if we assume that the

court did not commit error in permitting the witness Messman to testify in answer to interrogatory No. 613, yet there is nothing in the record to discredit exhibit 2 as a receipt given by plaintiff bank to Bolton for the note in question. The answer of witness Messman is that the writing on the piece of paper from which it is claimed exhibit 2 was detached related to the note sued upon. Exhibit 2 is an ordinary receipt, unambiguous, and signed, admittedly, by Davis, vice-president, and Messman, cashier, of plaintiff bank, delivered by them to Bolton, payee named in the note, and sufficiently descriptive of the note sued upon. That it was detached along a perforated line from another piece of paper, the contents of which were not disclosed to the trial court, does not take from it its character as an independent instrument. It is as complete and separable from the part of the paper that related to the note as an interest coupon, payable to bearer and detached from a mortgage bond or note, would be. The receipt being complete in itself, evidence that it was detached from another paper is not proof of multilation, and does not place the burden upon the defendant to explain the circumstances of the detachment, in the absence of evidence that the receipt and the paper from which it was detached were intended to be construed together.

We think it is scarcely necessary to discuss the contention of the plaintiff that it was error for the court to admit evidence with reference to whether the indorsement on the back of the note (exhibit 1) was in the handwriting of the payee. The petition alleges that Bolton, payee, indorsed and delivered the note to plaintiff, and that plaintiff thereby became the owner of said note. The defendant, Union Lumber Company, admits the execution of the note, but specifically denies that plaintiff is the owner of it. Interveners likewise deny that plaintiff is the owner of the note and assert that it is the property of the estate of the payee, now deceased. The sole question to be determined is whether plaintiff is the owner of the note sued upon. The plaintiff's claim of ownership is based specifically on the alleged indorsement of the name of the payee on the back

of the note. In the circumstances, we think the burden was upon plaintiff to prove the genuineness of the indorsement. Evidence was offered by defendant and interveners that the indorsement, "M. Bolton," on the back of the note is not in the handwriting of Bolton. The plaintiff offered testimony of as many or more witnesses who testified that the indorsement is in their judgment in the handwriting of the payee. In volume, perhaps, more evidence was offered by plaintiff to sustain its claim that the signature is that of Bolton than was offered by defendant and interveners. However, the trial court was the sole judge of the credibility of the witnesses, and the weight to be given to their testimony, and it found, as a question of fact, that the note was not the property of the plaintiff. It has long been the rule of this court that findings of fact made by a lower court in the trial of a law action will not be disturbed on appeal if there is sufficient competent evidence to support the findings. *Dorsey v. Wellman*, 85 Neb. 262.

In our judgment, there is ample evidence in the record to support the judgment of the lower court, and it follows that the judgment of the trial court should be, and is,

AFFIRMED.

JACOB FINZER, APPELLEE, V. GUSTAV PETER ET AL., APPELLEES: J. L. JOBES, APPELLANT.

FILED OCTOBER 31, 1930. No. 27256.

1. **Mortgages: ASSUMPTION BY GRANTEE: EXTENSION OF TIME: RELEASE.** The doctrine announced in *Merriam v. Miles*, 54 Neb. 566, that extension of time of payment granted by mortgagee to grantee, who had assumed and agreed to pay the mortgage debt, releases former grantees and mortgagor, when done with knowledge by mortgagee of relationship between prior parties and without their knowledge or consent, has no application in an action against grantees by mortgagor, who, in spite of changed conditions, was required to pay the debt.
2. ———: ———: **RIGHTS OF GRANTOR.** Grantor's rights against grantee under assumption agreement are founded upon the contract of sale and the promise of the grantee to pay the remainder of the purchase price. Such rights are independent of those which the assumption agreement confers on the mort-

gagee, and loss of mortgagee's rights against grantee does not affect the rights of the grantor unless an act of the mortgagee bestows such benefit on the grantor as to make enforcement of latter's right against grantee inequitable.

3. ———: ———: ———. The fact that the mortgagee had extended the time of payment of the mortgage debt to last grantee without knowledge or consent of the mortgagor and other grantees who had successively assumed the mortgage and agreed to pay is no defense to an action by the mortgagor to recover from grantees what he was compelled to pay by their failure to do so.
4. ———: ———. As between grantor and grantee who assumes and agrees to pay the mortgage debt, the latter becomes the principal debtor and the former the surety. In a suit by mortgagor against such successive grantees, the relationship of principal and surety has its application in equity by requiring payment by successive grantees in inverse order of alienation.
5. ———: ———: EQUITY. Equity is the proper forum in an action for reimbursement by mortgagor against successive grantees, each of whom had assumed and agreed to pay the mortgage debt.
6. **Equity** does directly what can be done indirectly and will in one action settle the diverse rights and obligations of parties successively liable for the same debt and will make that party liable who is ultimately liable at law.
7. **Limitation of Actions.** Generally, changes in the form of an action or in the character and extent of relief sought, in which the facts remain substantially the same, are amendments to the original pleading and not changes in the cause of action, nor do they create new causes of action.

APPEAL from the district court for Johnson county: JOHN B. RAPER, JUDGE. *Affirmed.*

Lewis C. Westwood and *Peterson & Devoe*, for appellant.

Jay C. Moore, Charles A. Dafoe, Hainer, Flansburg & Lee and *William G. Rutledge, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and THOMSEN, District Judge.

THOMSEN, District Judge.

Finzer mortgaged his farm to Peter, and shortly thereafter sold the land. The grantee, in the deed he received,

assumed and agreed to pay the mortgage, and in three subsequent successive sales each grantee assumed and agreed to pay the mortgage. While number three of these grantees held title, the mortgage became due, and by an arrangement with Peter, the mortgagee, the time for payment was twice extended, each time one year. During the last year number four acquired title, and, when that year ended, he likewise had granted to him an additional year to meet the obligation. None of these extensions was known to Finzer or the other grantees. When the final extension had expired, number four failed to pay. The mortgage Peter had received was a second one. One infers from the record that the value of the land had been absorbed by foreclosure of the first mortgage, so Peter chose to sue Finzer on the note which his mortgage secured. Finzer claimed that the extension of time for payment granted without his knowledge or consent released him, and relying upon *Merriam v. Miles,* 54 Neb. 566, in which we held that the maker and subsequent grantees under the conditions would be released, the case ultimately reached this court. The uniform negotiable instruments law definitely fixes the liability of the maker of a note. Comp. St. 1922, secs. 4671, 4729, 4730, 4801, *et seq.* That law was passed after the decision in *Merriam v. Miles, supra,* and so, in *Peter v. Finzer,* 116 Neb. 380, we held, since the statute made no provision for release of a maker of a note by an extension of time given by the payee to subsequent owners of land, Finzer was liable. Finzer paid the judgment. While Peter's suit against Finzer was pending, Finzer bestirred himself. He sued too. He brought in as parties defendant, in an action in equity, Peter and the subsequent grantees, recited the assumption agreement of the grantees and asked that the grantees be required to pay the debt to Peter and asked for other relief. Except for one amendment, which will be mentioned later in this opinion, this case remained stationary until Peter's suit was ended. Then Finzer again amended his petition alleging his new difficulty—that he was required to, and did, pay, and asked, together with equitable relief, for a judgment against the subsequent

grantees because each had assumed and agreed to pay the mortgage. The latter now also rely as a defense upon *Merriam v. Miles, supra.* Of these grantees only numbers one and two, respectively, Fred E. Bodie and J. L. Jobes, are involved in this appeal. They claim that the extension of time granted by Peter to numbers three and four, without their knowledge or consent, released them.

Under these conditions if we should now hold that extension of time of payment to last grantees would release all former grantees, as held in *Merriam v. Miles, supra,* it could be done only by entirely ignoring the obligation which each successive grantee assumed by contract with his grantor. The grantee agrees to pay the remainder of the purchase price to a third person to whom the grantor is either directly or by association indebted. Primarily the interest of the grantor in the contract with his grantee is to satisfy the obligation which he, the grantor, owes to his creditor. If, through some arrangement between the grantee and the creditor, the grantor is entirely relieved of the debt, it is obvious that the grantee's obligation to the grantor is satisfied. But, if the creditor's debt is not paid and the obligation of the grantor is not released, the grantee has never paid the remainder of the purchase price; he still owes it; he has not fulfilled his part of the contract.

Even though the assumption agreement confers rights on the mortgagee, the mortgagor still retains for himself such rights as the original indebtedness creates. That the benefit conferred upon the mortgagee by the assumption agreement does not result in a loss to the mortgagor of rights acquired by the contract creating the indebtedness is recognized in permitting the mortgagor to sue his grantee independently of any action by the mortgagee when the debt is due and unpaid. *Locke v. Homer,* 131 Mass. 93; *Morlan v. Loch,* 95 Kan. 716; *Callender v. Edmison,* 8 S. Dak. 81; *Gregory v. Hartley,* 6 Neb. 356; *Stichter v. Cox,* 52 Neb. 532. Particularly must the distinction between the rights of mortgagor and mortgagee under the conditions and the independence of such rights be recognized when both are permitted to file separate suits and subject

the grantee to two judgments for the same debt. *Gustafson v. Koehler,* 177 Minn. 115.

The object of the contract is satisfaction of the debt or payment. If, as in *Merriam v. Miles, supra,* the act of the mortgagee results in a release of both debtors, the mortgagor and grantee and all subsequent title holders, a satisfaction in law results. In that event the debt no longer exists; the cause for action has disappeared. But, how can it be said that the object of the contract has been attained by the act of a third person, the mortgagee, who accomplishes nothing to satisfy the debt?

Substantially what the defendants are contending is clarified in the following example: B owes A. A owes C. B agrees with A that B will pay A's debt to C. Because of some subsequent act of C, C cannot recover from B. However, C's act has not affected A's liability. C may still recover from A, but because of what C may have done A cannot recover what B still owes him. The fallacy in the reasoning is apparent. It lies in ignoring the contract creating the indebtedness between A and B and in overlooking that *A has done nothing* to estop him; that, if no element of estoppel is involved, the only way a debt can be satisfied is by payment.

From the foregoing it follows that the doctrine announced in *Merriam v. Miles, supra,* has no application to the facts in this case; that in an action by the mortgagor, who has been compelled to pay a debt which defendants assumed and agreed to pay, the defendants are liable on their assumption agreement; that no act of the mortgagee which does not result in a release of all parties can affect the contract between grantor and grantee.

As each grantee becomes in turn a grantor he also becomes a potential plaintiff without losing the role of a potential defendant. By a series of lawsuits beginning with the first and ending with the last grantor, the last grantee, the person who last owned the land, is compelled to pay. By compelling him to pay in the first instance, all the obligations of former grantees to their respective grantors are satisfied. Why pursue the circuit in lawsuits when

through equity a just result may be obtained in one suit, when other rights between the parties, if any exist, may all be determined and settled, for equity, having once taken charge, will do complete justice between the parties? But the defendant Jobes contends that the action as it stands is a lawsuit, nothing but a money demand, a prayer for a money judgment; that in law the liabilities are several and not joint, and that these defendants are improperly joined. However, the test of equity jurisdiction is not necessarily the prayer or that a money demand is made; the test is in the facts and what is to be accomplished. Equity prefers to do directly what can be done indirectly. Equity can best mete out justice in this very character of litigation and in which forum all the grantees can properly be joined.

In *Holland Reform School Society v. DeLazier*, 85 N. J. Eq. 497, 500, the court said: "That a court of equity is the only forum in which these various rights and obligations of the complainant and of the two defendants can be adjudicated upon in a single suit in such a way as to do complete justice to each of the parties is apparent. That it has jurisdiction to settle and enforce such rights and obligations, in order to avoid circuity of action, is undoubted. *Pruden v. Williams*, 26 N. J. Eq. 210, 212; *Biddle v. Pugh*, 59 N. J. Eq. 480, 490."

In that case, after foreclosure, A, the mortgagor, brought suit in equity for deficiency, which he had paid. His action was against his grantee, B, and a subsequent grantee, C, each of whom had, in turn, assumed and agreed to pay the mortgage. That A may in law sue B, and B in turn sue C, did not furnish such an adequate remedy as to exclude equity from granting in one action complete relief to all parties. The court held defendants B and C liable in inverse order of alienation.

Analogous to the instant case are suits by parties to non-negotiable notes in which equity hastens the result by its ability to render in one suit complete justice between the parties.

"Although the assignee of a note not negotiable cannot sue a remote assignee at law, yet he may in equity. A court

of equity will give a remedy by making him immediately liable who is ultimately liable, on the principle that the court entertains jurisdiction to avoid multiplicity of suits; and in such case the original assignor may make the same defense against the remote that he could make against his immediate assignee." *Smith v. Harley,* 8 Mo. 559.

"If there were twenty successive indorsers of a note, this circuitous course (successive lawsuits) might be pursued, and by the time the ultimate indorser was reached, the value of the note would be expended in the pursuit. This circumstance alone would afford a strong reason for enabling the holder to bring all the indorsers into that court which could, in a single decree, put an end to litigation. No principle adverse to such a proceeding is perceived. Its analogy to the familiar case of a suit in chancery by a creditor against the legatees of his debtor is not very remote. If an executor shall have distributed the estate of his testator, the creditor has an action at law against him, and he has his remedy against the legatees. The creditor has no action at law against the legatees. Yet, it has never been understood that the creditor is compelled to resort to his legal remedy. He may bring the executor and legatees both before a court of chancery, which court will decree immediate payment from those who are ultimately bound. * * * The defendant sustains no injury, for he may defend himself in equity against the holder as effectually as he could defend himself against his immediate assignee in a suit at law." Chief Justice Marshall in *Riddle & Co. v. Mandeville & Jamesson,* 5 Cranch (U. S.) 322, 329.

As further illustrative of the principle that equity will make that party immediately liable who is ultimately liable at law, see *Dodd v. Wilson,* 4 Del. Ch. 399; *Rue v. Meirs,* 43 N. J. Eq. 377; *Chalmers, Jones & Co. v. M'Murdo,* 5 Munf. (Va.) 252, 7 Am. Dec. 684; *Howell v. Baker,* 151 Atl. (N. J. Eq.) 117, and particularly the syllabus written by the court in that case.

In effect, the district court held the defendants liable in inverse order of alienation and in doing so the court was clearly right. It is further apparent that the plaintiff

chose the proper tribunal; that the parties are properly joined, and that a prayer for a money judgment is not a jurisdictional factor under the conditions.

Lastly, the defendants contend that the cause of action stated in the final amended petition is so essentially different from that stated in the original petition that it constitutes a distinctly new cause of action; that, since more than four years time has elapsed between the filing of such amendment and the accrual of this new cause of action, it is barred by the statute of limitations; that the beginning of the suit tolls the statute only as to the causes stated in the original petition, and that the filing of an amendment which states new and different causes for recovery does not relate back to the filing of the original petition, but virtually becomes a new suit requiring new service. If these contentions of the defendants were correct, of course the plaintiff's action would be barred. However, without encountering the difficulties in thought and research which the other defenses have presented, we reach the conclusion that no new cause of action is stated in the final amended petition; that the amendment properly relates back to the beginning of suit, the filing of the first petition, and therefore the action is not barred.

Three petitions were filed by the plaintiff, the original and two amendments. The facts stated in these three pleadings were essentially alike, except that in the supplemental amended petition the fact that the plaintiff's liability had been fixed by the supreme court and that he had paid the amount to the mortgagee was recited. The prayers differed. In the first petition the plaintiff prayed for an order or judgment against Bodie, Jobes, Cayou and Rapp requiring and compelling them to pay to Peter and that defendants Bodie, Jobes, Cayou and Rapp indemnify the plaintiff against the payment or liability of payment of said debt and for equitable relief.

The first amended petition asked "that the court will adjudicate the whole matter and determine the question as to extensions, * * * and that a decree be entered decreeing that there has been such valid extension of time as releases

this plaintiff from all liability thereon, and decreeing which one or ones of the defendants, if any, shall pay said debt. * * * That * * * the defendant Fred E. Bodie be compelled by the court to exonerate this plaintiff and * * * be required to pay to the holders of said note and mortgage, for this plaintiff, the amount decreed to be due thereon," and for equitable relief.

The supplemental amended petition prays for judgment against Bodie, Jobes, Cayou and Rapp or one of them whom the court finds directly liable to petitioner for the sum of ———, and for equitable relief.

Had the plaintiff pursued his action under the first petition he would probably have been entitled to relief, for, as we have shown above, he would have been entitled to proceed regardless of any action by the mortgagee. The additional fact that plaintiff had been required to pay, except to strengthen the equities of the situation, did not change his cause of action. His own liability fixed his right of recovery.

Considering what apparently theretofore had been the settled law of this state, we appreciate the probable confusion of thought which led to the two amendments. However, the action proceeded as one in equity. The court entered a "decree" and treated the matter as an equity proceeding. Thus, regardless of what the prayer may have been, the court would do complete equity between the parties. In the first petition the defendants were apprised of what the plaintiff expected of them; that a judgment on the *debt* might be entered. In the amended petition his request is substantially the same—"which one or ones of the defendants, if any, shall pay said debt;" and in the supplemental petition he asks for a judgment against the grantees or the one directly liable. All prayers are accompanied by a request for equitable relief. It is true that the relief to which he thought himself entitled changed in form; but the essential idea of the liability of the defendants or some one of them remained.

"The prayer of a petition is merely the pleader's idea of the relief to which he is entitled; it is not a part of the

statement of the cause of action; and if the cause of action is sufficiently stated and sufficiently proved, the court will adjudge and decree the proper legal redress, which may or may not conform in whole or in part to the relief prayed for by the pleader." *Eagan v. Murray,* 102 Kan. 193.

"The remedy sought is not the cause of action, and is no part of it. The cause of action, if valid, entitles the plaintiff to a remedy. In a proper case, he may change his claim for the remedy, without in any manner presenting a new cause of action. * * * The action after the amendment was simply a continuance of the original action, with a claim for a different remedy." *Case v. Blood,* 71 Ia. 632.

Changes in the form of an action and in the character or extent of relief sought, in which the facts upon which the action is based remain substantially the same, are generally held to be amendments, and not changes in the cause of action. For example: In *Friederichsen v. Renard,* 247 U. S. 207, a case arising in Nebraska, in which two Nebraska cases are mentioned as illustrative of the rule (*McKeighan v. Hopkins,* 19 Neb. 33, and *Butler v. Smith,* 84 Neb. 78, 28 L. R. A. n. s. 436), the court held a change in the prayer to be an amendment. The suit had been a suit in equity to cancel a contract for exchange of lands. Prayer changed to damages. Action at law on note changed to equitable action asking for subrogation. *Woodcock v. Bostic,* 128 N. Car. 243. Bill by mortgagee to quiet title amended after period of limitations asking for sale of mortgaged premises. *Easter v. Riley,* 79 Miss. 625. Action for damages amended to include equitable relief and to set aside conveyances. *Truman v. Lester,* 75 N. Y. Supp. 548. Amendment allowed setting up different measure of damages. *Scanlon v. Galveston, H. & S. A. R. Co.,* 86 S. W. (Tex. Civ. App.) 930; *Baker v. Gulf, C. & S. F. R. Co.,* 184 S. W. (Tex. Civ. App.) 257. For further examples see *Younglove v. Liebhardt,* 13 Neb. 557; *Shoemaker v. Commercial Union Assurance Co.,* 72 Neb. 650.

All the defenses have been ably and learnedly presented by counsel in briefs and argument, and merited and received most careful consideration. We reach the conclu-

sion, however, that justice has been well served in the conclusion reached by the district court, and its decree is in all respects

AFFIRMED.

JOHN C. SPOMER, ADMINISTRATOR, APPELLEE, V. ALLIED ELECTRIC & FIXTURE COMPANY, APPELLANT.

FILED NOVEMBER 7, 1930. No. 27421.

1. **Evidence**: CITY ORDINANCE. While a municipal court may take notice of a city ordinance, proof of its existence is ordinarily required in courts of general jurisdiction.
2. **Negligence**: DRIVERS OF AUTOMOBILES: CARE REQUIRED. "A driver of an automobile should have his car under such reasonable control as will enable him to avoid collision with other vehicles, assuming that the drivers thereof will exercise due care." *Thrapp v. Meyers*, 114 Neb. 689; *De Griselles v. Gans*, 116 Neb. 835.
3. ———: ———: REASONABLE CONTROL. Reasonable control by drivers of motor vehicles is such as will enable them to avoid collision with other vehicles operated without negligence in streets and intersections, and with pedestrians in the exercise of due care.
4. ———: ———: CARE REQUIRED. In the operation of motor vehicles complete control such as will only prevent a collision by anticipation of negligent or illegal disregard of traffic regulations, in absence of notice, warning or knowledge, is not required by the laws of Nebraska.
5. **Parent and Child**: SUPPORT OF PARENTS. The earnings of an unemancipated minor belong to his parents, but at common law a son is not legally bound to support them after he becomes of age.
6. ———: ———. The legal obligation of an adult child to support parents is limited to the conditions prescribed by statute, and cannot be enforced in an action against a third person.
7. **Negligence**: DAMAGES: CONTRIBUTORY NEGLIGENCE. Where contributory negligence is a controverted issue on which there is evidence on both sides in an action against defendant for causing the death of a minor by a wrongful act, the recovery, if any, should be diminished in proportion to the extent of the contributory negligence, according to the statutory rule.
8. **Death**: DAMAGES. "The measure of damage in an action by the personal representative of a child, for the benefit of its par-

ents, to recover for wrongfully causing the death of such child, is the present worth in money of the contributions having a general monetary value of which the parents are shown by the evidence with reasonable certainty to have been deprived by the act causing the death, and those contributions that are only probable, or conjectural, may not be included in the amount of such damage." *Fisher v. Trester*, 119 Neb. 529.

APPEAL from the district court for Lancaster county: ELWOOD B. CHAPPELL, JUDGE. *Reversed.*

Sanden, Anderson, Laughlin & Gradwohl, for appellant.

Chambers & Holland and *C. Russell Mattson, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and REDICK, District Judge.

ROSE, J

This is an action to recover damages in the sum of $20,000 for negligence resulting in the death of Edward John Spomer, a boy fifteen years of age. While riding west on a bicycle on F street in the city of Lincoln May 15, 1929, he was struck by a motor truck going south on Fourteenth street at the intersection of the two thoroughfares. As a result of the collision he died the next day. The truck belonged to defendant and was driven at the time by an employee named H. H. Hansen. John C. Spomer, the father of the boy, instituted the action as administrator.

The driver of the truck was charged by plaintiff with negligence in operating it at the high and unlawful speed of 35 miles an hour; in neglecting to signal his approach; in failing to keep between the center of the intersection and the curb line to his right as required by law; in not keeping a proper lookout; in failing to keep the truck under reasonable control; in driving in such reckless manner as to endanger life and property and interfere with lawful traffic.

Defendant denied plaintiff's charges of negligence, and pleaded that its driver exercised proper care; that Edward John Spomer was guilty of contributory negligence in riding his bicycle side by side with another bicycle rider in

violation of a city ordinance; in failing to give defendant's driver the right of way; in omitting to keep a proper lookout; in riding in front of the truck and suddenly stopping after it swerved to the east in an attempt by the driver to avoid a collision. Defendant alleged also that the proximate cause of the accident was the negligence of the bicycle riders. The reply to the answer was a general denial.

Upon a trial of the issues the jury rendered a verdict in favor of plaintiff for $5,450. From a judgment therefor defendant appealed.

The assignments of error are directed to instructions and to the verdict as excessive. On the issues of negligence, contributory negligence and proximate cause the evidence is conflicting. In respect to these issues testimony on behalf of plaintiff tends to prove generally the allegations of the petition, while the evidence adduced by defendant tends to support the defenses pleaded in the answer.

In an instruction of which complaint is made, the trial court directed the jury, among other things, that the laws of Nebraska and the ordinances of Lincoln required the driver of the motor vehicle to have it "under complete control." The instruction is erroneous. There is no evidence of a city ordinance requiring the driver of the truck to have it "under complete control" at the intersection. While a municipal court may take notice of a city ordinance, proof of its existence is ordinarily required in courts of general jurisdiction. *Foley v. State*, 42 Neb. 233. "Complete control" is not required by the laws of Nebraska, as stated in the instruction. The required degree of care has been defined as follows:

"A driver of an automobile should have his car under such reasonable control as will enable him to avoid collision with other vehicles, assuming that the drivers thereof will exercise due care." *Thrapp v. Meyers*, 114 Neb. 689; *De Griselles v. Gans*, 116 Neb. 835.

"Reasonable control" by drivers of motor vehicles is such as will enable them to avoid collision with other vehicles operated without negligence in streets or intersections, and with pedestrians in the exercise of due care; but "complete

control" such as will only prevent a collision by anticipation of negligence or illegal disregard of traffic regulations, in absence of notice, warning or knowledge, is not required by the laws of Nebraska. The instruction given by the trial court in the present case imposed upon defendant too high a degree of control under the circumstances.

An instruction containing the following language is also challenged by defendant as erroneous:

"No legal obligation rested upon Edward John Spomer to make contributions in money to his father and mother after he should reach the age of 21 years, so long as the father and mother are reasonably able to earn a livelihood; and whether such contributions would have been made by him during his and their lifetimes must be determined by you from all of the evidence, facts and circumstances of the case."

From this the jury were at liberty to infer an obligation or a legal duty on the part of the son, after attaining the age of 21 years, to make contributions to his parents, if they are unable to earn a livelihood. Thus considered, this instruction is at variance with both common and statutory law. The earnings of an unemancipated minor belong to his parents, but at common law a son is not legally bound to furnish them support after he becomes of age. 46 C. J. 1279, sec. 73. Thereafter his legal duty, if any, in that respect is imposed by a statute which provides:

"Every poor person, who shall be unable to earn a livelihood in consequence of any bodily infirmity, idiocy, lunacy or other unavoidable cause, shall be supported by the father, grandfather, mother, grandmother, children, grandchildren, brothers or sisters of such poor person if they or either of them be of sufficient ability." Comp. St. 1922, sec. 5140.

The legal liability of an adult son to support his parents does not extend beyond the terms of the statute. The right to enforce the obligation at law is granted to the county board and to the indigent person in an action against the relative who fails to perform the statutory duty, but the statute does not provide for a recovery in an action against a third person. *Allen v. Trester,* 112 Neb. 515; *Emel v.*

Standard Oil Co., 117 Neb. 418. The instruction, therefore, is erroneous.

Another instruction against which an assignment of error is directed contains the following directions:

"You are instructed that, if you find for the plaintiff, the amount of the recovery shall be the present worth of the monetary contributions less the expense of maintaining the deceased, if any, in money which you find from the evidence Edward John Spomer, deceased, would have made to his father and mother during his and their lifetimes had he lived."

The defense of contributory negligence was a controverted issue, on which there was evidence in favor of both parties. While the trial court directed the jury to deduct from the present worth of monetary contributions the expense of maintenance, a direction to diminish the recovery in proportion to the amount of contributory negligence, if any, according to the statutory rule, was omitted. With such matter excluded the instruction is incomplete. Standing alone, it is erroneous for the reason stated, but the omission does not necessarily require a reversal, because another instruction contained a correct statement of the comparative negligence law applicable to the issues and proofs.

The following rule was recently announced:

"The measure of damage in an action by the personal representative of a child, for the benefit of its parents, to recover for wrongfully causing the death of such child, is the present worth in money of the contributions having a general monetary value of which the parents are shown by the evidence with reasonable certainty to have been deprived by the act causing the death, and those contributions that are only probable, or conjectural, may not be included in the amount of such damage." *Fisher v. Trester*, 119 Neb. 529.

For the errors indicated, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

THOMAS H. MATTERS V. STATE OF NEBRASKA.

FILED NOVEMBER 7, 1930. No. 27488.

1. **Embezzlement**: INFORMATION: SUFFICIENCY. The words, "private person," contained in section 1, ch. 95, Laws 1923, are used to distinguish a natural person from an artificial person, such as a corporation, copartnership, or joint stock company. The name, C. B. Miller, is sufficient to indicate a "private person," within the meaning of the statute.
2. **Information**: SUFFICIENCY. An information for embezzlement by an agent sufficiently charges agency if in the language of the statute.
3. **Statutory Provision**. "The accused shall be taken to have waived all defects which may be excepted to by a motion to quash, * * * by demurring to an indictment or pleading in bar or the general issue." Comp. St. 1922, sec. 10113.
4. ———. "A motion to quash may be made in all cases, when there is a defect apparent upon the face of the record, including defects in the form of the indictment or in the manner in which an offense is charged." Comp. St. 1922, sec. 10109.
5. **Information**: ELECTION: DISCRETION OF COURT. As a rule, where different felonies of the same character and grade are charged in different counts of an information, it is within the discretion of the trial court whether the prosecutor shall be required to elect upon which count of the information he will rely for a conviction.
6. **Criminal Law**: CONVICTION: CONFLICT OF EVIDENCE: REVIEW. "This court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt." *Williams v. State*, 115 Neb. 277.
7. ———: NEW TRIAL. A motion for a new trial in a criminal action, based upon alleged misconduct of the jury and bailiff, is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of discretion is shown.
8. ———: TRIAL: EXCLUSION OF EVIDENCE. The exclusion of competent evidence, cumulative in character, will not work a reversal, unless such exclusion has been prejudicial to the complaining party.
9. **Witnesses**: COMPETENCY: ATTORNEYS. An attorney is incompetent to testify to any communications made to him by his client in that relation, or his advice thereon, without his client's con-

sent in open court or in writing produced in court; and the fact that no compensation is paid will not remove the seal of secrecy from the communications made to him.

ERROR to the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Affirmed.*

O'Sullivan & Southard and *M. O. Cunningham,* for plaintiff in error.

C. A. Sorensen, Attorney General, and *L. Ross Newkirk, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and REDICK, District Judge.

GOOD, J.

Plaintiff in error, hereinafter designated defendant, was prosecuted on an information containing two counts; the first charging embezzlement as agent; the second charging larceny as bailee. A trial resulted in defendant's conviction on the first and acquittal on the second count. From a judgment imposing a prison sentence of from one to two years, defendant prosecutes error.

There are a large number of assignments of error, many of which are extremely technical. We shall consider such as seem to merit discussion.

Defendant demurred to the information, and at the close of all the evidence moved for a directed verdict of not guilty, on the ground that the first count of the information did not state an offense under the law. The precise points relied upon are: First, that it was not alleged that C. B. Miller, the owner of the fund alleged to have been embezzled, was a private person; and, second, that it did not allege the terms and conditions of the contract creating an agency between C. B. Miller and the defendant.

Section 1, ch. 95, Laws 1923, under which defendant was prosecuted, *inter alia,* provides: "If any clerk, agent, attorney at law, servant, factor or commission agent of any private person or any copartnership, except apprentices and persons within the age of eighteen years, or if any

officer, attorney at law, agent, clerk, servant, factor or commission agent of any incorporated company or joint stock company, * * * shall embezzle," etc. The information merely charged the embezzlement of money from one C. B. Miller, without alleging that C. B. Miller was a private person.

We think the words "private person," as contained in the statute, are used to distinguish a natural person from an artificial person, such as a corporation, copartnership, joint stock company, etc. The name, C. B. Miller, is sufficient to indicate an individual or a "private person," within the meaning of the statute. So far as the failure to state the terms and conditions creating the agency existing between the defendant and C. B. Miller is concerned, it is sufficient to say that the information in this respect was in the language of the statute.

It has been frequently held that an indictment or information charging embezzlement is sufficient if it sets forth the crime in the language of the statute or the equivalent thereof. *Leisenberg v. State,* 60 Neb. 628; *Bartley v. State,* 53 Neb. 310; *Chamberlain v. State,* 80 Neb. 812; *State v. Halbert,* 115 Neb. 194. But these two assignments are unavailing for another reason. If the information was not sufficiently specific to satisfy the defendant, he was afforded a remedy by motion to quash. He failed to avail himself of such remedy.

Section 10113, Comp. St. 1922, provides: "The accused shall be taken to have waived all defects which may be excepted to by a motion to quash, * * * by demurring to an indictment or pleading in bar or the general issue." Section 10109, Comp. St. 1922, provides: "A motion to quash may be made in all cases, when there is a defect apparent upon the face of the record, including defects in the form of the indictment or in the manner in which an offense is charged." Failure to make the motion was a waiver of the right to attack the information for any defect that appears upon its face. *Trimble v. State,* 61 Neb. 604; *Goddard v. State,* 73 Neb. 739; *Huette v. State,* 87

Neb. 798; *Green v. State,* 116 Neb. 635; *Lindley v. State,* 117 Neb. 597.

Defendant asserts that there was error in overruling his motions to require the prosecutor to elect on which count of the information he would rely for a conviction. The motions were made at the close of the state's evidence and also at the close of all the evidence. It is a rule that, where different felonies of the same character and grade are charged in different counts of an information, it is within the discretion of the trial court whether the prosecutor shall be required to elect upon which count of the information he will rely for a conviction. In the instant case, the felonies charged, while growing out of the same transaction, are of the same grade, and the punishment is the same in each instance. Unless an abuse of discretion is shown which has been prejudicial to the rights of the defendant, an order overruling such motion will not cause a reversal of the judgment. The case was submitted to the jury upon both counts, but the jury acquitted the defendant on one count, and, under the circumstances, the failure to require the prosecutor to elect could not have been prejudicial to the defendant.

A number of assignments of error go to the sufficiency of the evidence to support the verdict. Defendant contends that the evidence is wholly insufficient to show that there was any agency, or that he received the money in the character of agent for Miss Miller.

Certain parts of the evidence, standing alone, would clearly support this contention. That Miss Miller drew her check for $200, payable to defendant, and turned the same over to him on the 6th day of October, 1927, and which check was cashed by defendant on the same or the next day, is not disputed. That the check was cashed and the money converted to defendant's use is beyond question. Defendant contends that the money was paid to him as a part purchase price of certain real property which Miss Miller was purchasing from him. However, at the time the check was given, the defendant gave to Miss Miller a receipt in the following form:

"Omaha, Neb. October 6, 1927.

"Received of C. B. Miller Two hundred & no/100 Dollars to be used in purchase of 5402 & 04 Leavenworth Street—if for any reason this deal is not completed this money is to be refunded—Amt. of purchase price $12,500.

"$200 (Signed) Thomas H. Matters."

Defendant claims that he was selling the property; that he held title to it by contract. Miss Miller, on the other hand, testifies that defendant did not claim to be the owner, but that the property belonged to other persons. The form of the receipt issued by defendant indicates very clearly that he was receiving it to be used in purchasing property, and if he was purchasing he must have been purchasing for C. B. Miller. If he was acting for C. B. Miller then he was her agent and so received the money. There was sufficient evidence to justify the jury in so finding.

The real estate in question was never conveyed to Miss Miller; nor was any conveyance tendered to her. No writing pertaining to conveyance of real estate, save the check and the receipt heretofore mentioned, is disclosed by the record. Whatever may have been the deal between defendant and Miss Miller, it was never completed; nor has the money been refunded to her. There is some evidence, however, tending to show that, when criminal prosecution was imminent, defendant offered to return the money. This is denied by Miss Miller. The record presents a conflict of evidence upon material questions. It was for the jury to determine the credibility of the witnesses and the weight to be given to their testimony. In *Williams v. State*, 115 Neb. 277, the rule is announced in the following language: "This court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt." Other cases adhering to this rule are *Curtis v. State*, 97 Neb. 397; *Denker v. State*, 106 Neb. 779; *Smith v. State*, 109 Neb. 579; *Ingoldsby v. State*, 110 Neb. 495. Under the

record presented, this court is unable to say, as a matter of law, that the verdict is not sustained by sufficient evidence.

Complaint is made of the misconduct of jurors and the bailiff. It is alleged that the bailiff entered the jury room while the jurors were deliberating and advised them as to their course. There was other evidence tending to show that all that occurred was that the jury requested the bailiff to ask the court to come to the jury room and give them further instructions; that he conveyed this oral message to the judge, who informed the bailiff that he did not care to give any further instructions, and this answer was carried back to the jury. There was conflicting evidence as to some advice given by the bailiff concerning the signing of the verdict. While this court cannot approve of the conduct of the bailiff in entering the jury room and holding any conversations whatever with the jurors concerning the case or any fact connected with the case which they are considering, we are unable to state that what occurred was prejudicial to the defendant. Whether or not the motion for a new trial should have been granted upon the misconduct of the bailiff and the jurors in this respect was a question addressed to the sound discretion of the trial court. The court's ruling on such motion will not be disturbed in the absence of a showing of an abuse of discretion. Such abuse is not disclosed.

Misconduct of the jury is also charged in that one of the jurors, during their deliberations, produced a dictionary and read from it the definition of some words which were contained in an instruction. This conduct was highly improper. The jury should have relied solely upon the evidence for the facts, and upon the court's instructions for the law, of the case. Not every violation of the proprieties, however, is sufficient to reverse a judgment. It is only such misconduct of the jury as is calculated to prejudice the substantial rights of the defendant that is ground for a new trial. In *Simmons v. State,* 111 Neb. 644, this court held: "Whether a motion for a new trial in a crim-

inal case, based on alleged misconduct of jurors, should be sustained rests in the sound discretion of the trial court, and its ruling on such motion will not be disturbed unless an abuse of discretion is shown." This ruling was approved and adhered to in *Murray v. State,* 119 Neb. 16. The record does not disclose that any substantial right of defendant was affected by the alleged misconduct of the jury; nor does the record disclose any abuse of judicial discretion in its ruling on the motion.

Complaint is made because the trial court did not permit the defendant, while on the stand as a witness, to answer a certain question relative to his criminal intent or lack thereof with respect to the transaction. It might have been better had the court permitted the question to be answered. However, defendant had fully given his version of the transaction and what his intent and purpose were, and the answer to the particular question could have added very little, if anything, to that which had been testified to by defendant. The evidence was cumulative; its exclusion could scarcely have been prejudicial.

During the progress of the trial a practicing attorney was called as a witness on behalf of the defendant and was asked many questions as to alleged conversations had with the complaining witness Miller. The court sustained objections on the ground that the testimony was privileged; that whatever communications were made by Miss Miller to the attorney were of a confidential nature and could not be received in evidence over objection. The witness stated that he was not and never had been attorney for Miss Miller; that he had never received any fee or retainer from her; but the record disclosed that she consulted him and asked his advice on questions of a legal nature respecting the transaction involved in this case. The witness apparently was not only willing but eager to testify as to conversations, and apparently sought to shield his testimony from the objection, on the ground that he had received no fee or retainer.

Section 8835, Comp. St. 1922, *inter alia,* provides:

"The following persons shall be incompetent to testify: * * *

"Fourth. An attorney concerning any communication made to him by his client in that relation or his advice thereon, without the client's consent in open court or in writing produced in court."

Section 8840, *inter alia,* provides: "No practicing attorney, counselor, * * * shall be allowed in giving testimony to disclose any confidential communication, properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice."

In *Fimple v. State,* 104 Neb. 471, it was held: "Statements made to an attorney, with a view to his employment in the litigation in which he is called to testify, are privileged, even though no fee has been paid and the attorney subsequently refuses a retainer."

In 28 R. C. L. 554, sec. 144, it is said: "If an attorney is consulted in his professional capacity, and he allows the consultation to proceed and acts as adviser, the fact that no compensation is paid will not remove the seal of secrecy from the communications made to him. In the absence of an express understanding that no charge be made, it is enough that the attorney is applied to for advice or aid in his professional character, the legal obligation to pay a quantum meruit being in this respect as effectual a retainer as an actual payment. Furthermore, the intention of the parties at the time the communication was made as to the payment or exaction of a fee is, in the eyes of some of the courts, entirely immaterial. And it is of no consequence that the party making the communication understands that the attorney is to be paid his fee by some third person."

After objection to an interrogatory was sustained, defendant offered to prove that Miss Miller sought the advice of the witness as to whether a criminal prosecution would lie, and that the witness advised her with respect thereto. The offer clearly indicates the relation of attorney and

client. The testimony sought to be elicited by the witness was of such a character that little doubt can exist that, if such communications were made by Miss Miller to the witness, they were made to a legal adviser and were confidential. The evidence was sufficient to justify the trial court in excluding the proffered testimony.

No prejudicial error has been found. The judgment is

AFFIRMED.

SETH MARKLE ET AL., APPELLANTS, V. PHŒBE MARKLE ET AL., APPELLEES.

FILED NOVEMBER 7, 1930. No. 27409.

Partition: SUIT BY HEIR OR DEVISEE. "An heir or devisee of an estate cannot maintain an action for distribution or partition until the debts, allowances, and expenses against said estate have been paid or provided for, unless he give a bond with approved sureties to pay the same." *Alexander v. Alexander*, 26 Neb. 68.

APPEAL from the district court for Lancaster county: ELWOOD B. CHAPPELL, JUDGE. *Affirmed.*

Norval Brothers and *Perry, Van Pelt & Marti*, for appellants.

Kinsinger & Ogden, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and REDICK, District Judge.

REDICK, District Judge.

This is an action for partition of real estate between the heirs of Volney A. Markle, deceased. The petition alleges the necessary facts showing title. All heirs, including the widow of deceased, were joined as plaintiffs or defendants, and some others as having an interest in or lien upon the property. The petition then alleged "that the said deceased left no debts, claims or expenses against his said estate."

The defendants filed separate demurrers to the petition on the ground that it did not state facts sufficient to con-

stitute a cause of action. The demurrers were sustained and, plaintiffs electing to stand on the petition, the action was dismissed, and plaintiffs appeal.

The point raised by the demurrers is that the district court was without jurisdiction to grant the prayer of the petition. The point is well taken.

Section 1441, Comp. St. 1922, provides: "No heir * * * shall be entitled to a decree for his share until payment of debts and allowances and expenses mentioned in the preceding section shall have been paid or provided for, unless he shall give bond to the county judge." The allowances referred to are such as may be made during administration by the county court for the expense of the maintenance of the family of deceased, and support of children under seven years of age. The allegations of the petition do not negative the existence, present or prospective, of an allowance for the maintenance of the widow pending administration, though it does show that all the children are of age; neither does it allege that such allowance, if made, has been provided for.

The case is ruled by *Alexander v. Alexander*, 26 Neb. 68, wherein it was held: "An heir or devisee of an estate cannot maintain an action for distribution or partition until the debts, allowances, and expenses against said estate have been paid or provided for, unless he give a bond with approved sureties to pay the same." This case was followed in *Reckewey v. Waltemath*, 28 Neb. 492. No administration of the estate had been commenced at the beginning of this action, but this fact does not alter the rule. The judgment is

AFFIRMED.

STATE, EX REL. AMANDA C. ANDRUSS, APPELLEE, V. MAYOR AND COUNCIL OF CITY OF NORTH PLATTE, APPELLANTS.

FILED NOVEMBER 14, 1930. No. 27367.

1. **Municipal Corporations: ORDINANCES: VALIDITY.** When a city has, in the exercise of the police power delegated to it by statute, adopted an ordinance having substantial relation to public

health, safety and general welfare, it will not be held invalid unless the evidence is clear and satisfactory that it is arbitrary, unreasonable or discriminatory.

2. ———: GASOLINE FILLING STATIONS: LICENSES. When a city, either under the general welfare statute, or under the statute delegating the control of the streets, or the statute granting control of the storage of petroleum products, enacts an ordinance to license gasoline filling stations for automobiles, its duty to grant such license is absolute, whenever an applicant complies with the provisions of the ordinance.

3. ———: POWERS. The exercise by the municipal authorities of the delegated powers, above mentioned, is to be by ordinance.

4. ———: LICENSES: DISCRETION OF COUNCIL: MANDAMUS. Mandamus is the proper remedy to compel the city council to issue a license, the issuing of which is a purely ministerial act; when the relator has complied with all the conditions, his right to said license becomes clear and absolute, unless the council is vested with discretionary powers in issuing said license. Nevertheless, such discretion must be exercised in a reasonable, and not in an arbitrary and discriminatory, manner.

APPEAL from the district court for Lincoln county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

William E. Shuman and *J. T. Keefe,* for appellants.

E. H. Evans, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ.

DAY, J.

This is a mandamus action to compel the city of North Platte to issue to the relator a permit to operate a gasoline filling station upon her property located within said city. The city council refused to issue the permit. The trial court granted a peremptory writ of mandamus directing the city to issue the permit. The city appeals.

The city of North Platte has regulated filling stations and oil pumps by ordinance. It was pursuant to the provisions of the said ordinance that the relator herein made application for a permit. The city council held a hearing at which numerous protestants were present in the person

of residents and property owners of the neighborhood in which the relator sought to install the filling station. The city council, exercising what they contend was a proper discretion, denied the application of the relator and refused to issue the permit. Since this ordinance is an important and vital part of the case, a reproduction of it here is necessary to understand the questions involved:

"Article XI. Filling Stations and Pumps.

"Sec. 254. License. It shall be unlawful for any person, firm or corporation to hereafter engage in the business of operating a filling station for automobiles, or to make a business of selling power or fuel to replenish or operate same, within the city of North Platte, without first having obtained a license therefor.

"Sec. 255. Requirements of Application. Before such license is granted, any applicant shall apply to the mayor and council, describing the location and what, if any, use is contemplated of the adjacent street or sidewalk.

"Sec. 256. Amount of License. Control of Street Retained. When granted, the annual license fee therefor shall be the sum of ten dollars ($10) for each pump that supplies gasoline, fuel or power along the curb, and twenty-five dollars ($25) for each station, regardless of the number of pumps, where motor vehicles, receiving service thereat, customarily drive across the sidewalk or sidewalk line to receive such service, payable in advance, and the city reserves the right of control over any street or sidewalk used in connection therewith, and may make such rules and requirements, with reference to any particular license, in the use of the streets and sidewalks and in the operation of the business, as shall, in the judgment of the mayor and council, be necessary to facilitate traffic, and protect the public and adjacent property owners.

"Sec. 257. Granting of License, When Discretionary. The city further reserves the right to deny any application in a section of the city used exclusively for residential purposes and farther away than one city block from the fire limit district of the city and off the main arteries of travel

to and from the city, where in the judgment of the mayor and council any nuisance caused thereby to the neighborhood, or the potential depreciation of adjacent real estate or inconvenience to the enjoyment thereof, shall outweigh private benefits and gain to the licensee, his landlord or grantee, and the convenience and necessity of the public."

It will be noted that this ordinance provides for the operation of gasoline filling stations by those licensed by the city council. It provides that the control of the streets be retained, and regulates the use to be made thereof in the licensing and operation of said filling station. The control herein provided for over the use to be made of the streets and sidewalks contemplates that a reasonable use thereof shall be made by the owner and operator of such filling station. The control of the use of the streets and sidewalks as provided by this provision of the ordinance contemplates such use, and not a prohibition of the same. We are much concerned in our consideration of the controversy here with that section of the ordinance above reproduced relating to the discretionary power of the city in granting a license. The city has reserved the right to deny such application when three conditions are present: First, the location must be in a section of the city used exclusively for residential purposes; second, it must be farther away than one city block from the fire limit district; third, it must be off the main arteries of travel to and from the city. When these three conditions meet in relation to the property for which a license is sought, then the city has retained the right to exercise discrimination in the granting or denial of a permit. The property involved in this case is in a section of the city almost exclusively used for residential purposes, it is farther than one block from the fire limit district of the city, but it lacks the other essential requirement to give the city council discretion in the matter of a permit, in that it is not off a main artery of travel to and from the city. The fact as disclosed by the evidence and not disputed by the respondent is that the property in question is located upon

the Lincoln Highway, a main artery of travel to and from said city. It consequently follows, therefore, that this property is not located within the district within which the city has retained discretionary powers in the granting of licenses. Relying upon that ordinance, the relator herein has complied with its provisions. The granting of the license was then a ministerial act which the city was bound to perform in relation to any one who complied with the condition therein, and the right of the relator to the permit was absolute.

The city has the undoubted power by ordinance to make all such rules, regulations and resolutions not inconsistent with the law of the state as may be expedient in addition to the special powers granted for maintaining the peace, good government and welfare of the city, and its trade, commerce and manufactures. Comp. St. 1922, secs. 3986-4030. The power conferred under this statute is popularly known as the general welfare clause of the statute. Under it the zoning ordinances in various cities have been adopted. In *City of Lincoln v. Foss,* 119 Neb. 666, it was held that the city had a right under the police power conferred under this section to pass an ordinance restricting the use of property, if said ordinance has a substantial relation to the public safety, health, and general welfare. This proposition is also supported in this jurisdiction by *State v. Withnell,* 78 Neb. 33; *State v. Edgecomb,* 108 Neb. 859; and *Pettis v. Alpha Alpha Chapter of Phi Beta Pi,* 115 Neb. 525. In *Standard Oil Co. v. City of Kearney,* 106 Neb. 558, this court said that, in the exercise of the police power delegated to a city, it is generally for the municipal authorities to determine the rules, regulations and ordinances that are required for health, comfort and safety of the people, but their action is subject to the scrutiny of the courts. In that particular case, the ordinance was held void as being an arbitrary, unreasonable, and discriminatory exercise of the police power. The power and the authority of the city to pass such an ordinance is well defined in the foregoing cases. However, the city of North Platte is asserting the validity of the ordinance in question by its enforcement

of the provisions relative to licensing filling stations. The relator also contends that the ordinance is valid. We assume, therefore, for the purposes of this case only, that the ordinance herein set forth is valid, and that the city may exercise control by ordinance which has a reasonable reference to the public health, safety, or general welfare, and is not arbitrary, unreasonable, or discriminatory. In *State v. Edgecomb,* 108 Neb. 859, a peremptory writ of mandamus was granted directing the building inspector of the city of Omaha to issue a building permit in a case where it was held by the court that the restrictions in the ordinance under which the building inspector refused the permit were unreasonable. Having in mind the ordinance, together with the decisions of this court herein cited, we conclude that the applicant for a permit, the relator herein, has complied with all of the regulations as set out in the ordinance, and that the duty of the city to grant the permit sought was absolute; that the city had not retained any discretion in the matter after one had complied with the conditions; and that the issuance of said permit was an administrative act, and that the peremptory writ of mandamus was properly granted in this case, considered solely under the ordinance. 19 R. C. L. 977, sec. 274.

However, the respondents in this case contend that the statutes of the state grant and confer upon the municipality control of the streets, and for that reason the city had the right to reject the application of the relator, regardless of any ordinance. This power is granted under sections 4076 and 4077, Comp. St. 1922. It is the theory of the respondents that, under this authority conferred upon the city, it could refuse a permit to the relator to operate a filling station on her property. In *Kenney v. Village of Dorchester,* 101 Neb. 425, it was held that the right of a private party to occupy part of a public street in front of his place of business must yield to public necessity or convenience, and a question of public necessity or convenience is for the governing body of the municipality, but such body cannot act arbitrarily and deny to one citizen a privilege which is granted to another under like conditions. In this case, the

plaintiff was actually occupying the street with physical property. He installed a pump in the street between the sidewalk and curb line connected with a tank buried under the surface of the ground for the purpose of conveying gasoline into automobiles. The village of Dorchester sought to compel him to remove his pump, while they permitted a competitor a block and a half distant to operate. It appeared that the operation of the curb pump of the plaintiff did not interfere with the public use of the street in any manner different from that of him to whom the permit had been granted. The evidence in this case discloses that in the city of North Platte a permit has been granted to another to operate a filling station on the same street and in the same block as the property for which the relator seeks a permit. There is nothing in the evidence in this case to indicate any reason for the discrimination or to indicate that there is any difference in the use contemplated to be made of the street in connection with those two situations. True, there is a feeble attempt to show that school children pass this corner, but the evidence is not convincing that more children pass this corner than the other. In fact, the evidence rather indicates that the traffic is more congested at the other corner. However, this is a law action which was tried to the court (*State v. Farrington*, 86 Neb. 653), and the findings of the trial court in such case, based upon conflicting testimony, will not be set aside unless it is disclosed by the record that the verdict was clearly wrong. This identical question was before the court again in *City of Pierce v. Schramm*, 116 Neb. 263, where the rule announced in *Kenney v. Village of Dorchester, supra*, was examined, approved and followed. The gist of the decision in that case is that the municipality cannot select one of a number of persons similarly situated and arbitrarily discriminate against him. We are forced to the conclusion that the instant case, if considered from this standpoint, is governed by *Kenney v. Village of Dorchester, supra*, and *City of Pierce v. Schramm, supra*, and that the action of the city council in denying the application of the relator was arbitrary and discriminatory, considered in this light.

This argument applies with equal force to the contention that the city could refuse a permit because it has been given control by section 4011, Comp. St. 1922, over the storage of the products of petroleum. This power is to be exercised by ordinance. Comp. St. 1922, sec. 3986. This permit was not denied under any such ordinance. There would seem to be no good reason to discriminate between the relator herein and others operating under similar circumstances. The action of the trial judge in granting a peremptory writ of mandamus was proper.

Another assignment of error has to do with the procedure followed by the trial court. It is strenuously urged that the trial was held with undue and unusual haste. The record discloses that this case was filed October 23, 1929. This matter had previously been before the city council, and the city attorney and the special attorney for the city were familiar with it, having appeared there. Six days intervened from the filing of the petition and the granting of the peremptory writ. One of the attorneys was engaged in the trial of another case continuously. The attorneys had all of the documents and records in their possession, including the ordinances relative to this matter, which they claim were not properly introduced in evidence. The matter of setting trials is in the discretion of the trial court. A peremptory writ of mandamus might have been granted by the trial court without notice, particularly in a case where a public official has failed to discharge an official duty and action is imperative, as in this case. *Horton v. State*, 60 Neb. 701. A motion for new trial was filed in this case in which evidence was taken which does not disclose that the city attorney could not have secured the evidence there introduced, which was largely cumulative. It is not discernible wherein the respondents were prejudiced by a failure to secure any evidence.

In conclusion, we take note of the contention of the city that the ordinance in question was not introduced in evidence. It was pleaded and set out in full in the petition of the relator. In a pleading filed by the city attorney, designated "Objections to Issuing Writ" which was treated by

the trial court and the parties and the case tried upon that theory, the city justified the denial of the permit by the council on the ground that it was a matter which rested in the judgment, discretion and control of the mayor and council of the city. Since the statutes provided that such discretion and control must be exercised by ordinance, and since the pleading does not deny the correctness of the ordinance pleaded, but rather justifies their action thereunder, it amounts to an admission of the same. *Livesey v. Brown*, 35 Neb. 111; *Hanson v. Lehman*, 18 Neb. 564; *Linch v. State*, 30 Neb. 740; *State v. Baushausen*, 49 Neb. 558. Since they do not point out what evidence, if any, they were unable to secure, which would materially affect the issues, we do not find any prejudicial error.

The judgment of the trial court is in all respects

AFFIRMED.

ROSE, J., dissents.

BLUE VALLEY STATE BANK, APPELLEE, V. A. W. MILBURN ET AL.: WILLIAM PRAHL, APPELLANT.

FILED NOVEMBER 14, 1930. No. 27357.

1. **Trial**: INSTRUCTIONS. It is the duty of the court to instruct the jury upon the issues presented by the pleadings and evidence, whether requested so to do or not.
2. **Partnership**: QUESTION FOR JURY. Where the existence of a partnership is in dispute and the evidence contradictory, the question is for the jury under appropriate instructions.
3. ———: CONTRACT: PRESUMPTION. Where plaintiff seeks to hold a third party as a partner upon a contract signed by only one person, there is a presumption of law that the contract is that of the individual signing the same, and it is incumbent upon plaintiff to show that it was a partnership transaction.
4. ———: PROOF. If plaintiff seeks to hold the defendant as a partner by reason of his having held himself out as such, plaintiff must show that he relied upon such holding out in making the contract.
5. **Appeal**: REFUSAL OF INSTRUCTIONS. The refusal of the court to give instructions requested by the defendant upon issues presented by the pleadings and evidence, and not covered by the

instructions given by the court upon its own motion, may be ground for reversal of the judgment.

6. ———: FAILURE TO INSTRUCT. Where the petition presents several distinct grounds for recovery and the court fails to properly instruct upon each of such grounds, such failure is reversible error when the verdict is a general one for plaintiff, as it is impossible to determine upon which ground the jury based its verdict.

APPEAL from the district court for Clay county: LEWIS H. BLACKLEDGE, JUDGE. *Reversed.*

M. H. Leamy and *Flansburg & Lee,* for appellant.

Perry, Van Pelt & Marti and *C. L. Stewart, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and REDICK, District Judge.

REDICK, District Judge.

This action was originally brought by Blue Valley State Bank, a corporation, against A. W. Milburn, William Prahl, and Milburn & Prahl, a copartnership, to recover a judgment upon four promissory notes aggregating about $8,000, payable to the bank and signed by A. W. Milburn. Owing to the bankruptcy of Milburn, the insolvency of the bank, and the death of Prahl, pending the action, the personnel of the parties has been changed, but for the purposes of this opinion it will be considered a suit by the bank against Prahl.

The petition of plaintiff predicates liability of Prahl upon three grounds: First, that Milburn and Prahl were partners; second, that Milburn and Prahl held themselves out as partners and the moneys were loaned on notes signed by Milburn in reliance on such holding out; and, third, an oral agreement between the bank and Milburn and Prahl that the bank should loan money on Milburn's notes and Prahl would be liable thereon as upon his own obligations.

The answer of defendant Prahl denies generally the allegations of the petition, and denies specifically the existence of a partnership, and alleges that the relationship between Milburn and Prahl was that of landlord and tenant;

that Prahl was the owner of a farm and leased it, together with stock, farming implements and tools, to Milburn. The defendant further alleges that the moneys advanced upon the Milburn notes were for the personal use and benefit of Milburn and without the knowledge or consent of the defendant. The answer further sets up the statute of frauds and several other matters which it will not be necessary to notice. The reply was in the nature of a general denial.

There was a trial to a jury resulting in a verdict for plaintiff for $10,000, judgment thereon, motion for a new trial overruled, and defendant Prahl appeals. A former judgment against Prahl was reversed by this court, and reference may be had to the opinion in that case for a more extended statement of the issues. *Blue Valley State Bank v. Milburn,* 116 Neb. 131.

The errors relied upon for reversal are: (1) The verdict is not sustained by sufficient evidence; (2) error in the assessment of the amount of recovery; and (3) error in the giving and refusing of instructions.

As to the first error asserted, it will suffice to say that the evidence is in conflict and we think the case fairly presents questions of fact for the jury. As to the second assignment, the verdict is less than the amount due plaintiff if it was entitled to recover, but of this the defendant cannot be heard to complain. The only questions, therefore, which we will consider are the assignments relating to the giving and refusing of instructions.

The first objection requiring notice is to instruction No. 2 given by the court upon its own motion. By its first instruction the court stated the issues substantially as made by the pleadings, and as instruction No. 2 is the only one purporting to state the law as applied to the pleadings and proof we copy it in full:

"As to the plaintiff's demands, the proposition here in controversy is whether the defendant, William Prahl, assumed responsibility for the sums loaned by the bank in the transactions had by it wholly or chiefly with the defendant Milburn, and whether said defendant Prahl authorized such loans to be made as they were made, agreeing

on his part to be liable therefor jointly with Milburn as his own obligations and to see that they were paid to the bank. The burden rests on the plaintiff to establish at the trial by the greater weight of the evidence the truth of these facts before it would be entitled to a favorable verdict. If it has done so as to the whole or any part of its demands sued on herein, then it would be entitled to a recovery in this case for the amount due on so much of its demands as are so established. If it has not done so as to any of its said demands, then it would not be entitled to a verdict in its favor.

"In determining the liability of defendant Prahl upon the plaintiff's demands you will consider the evidence given at the trial bearing upon that question. And you are instructed that it was competent for the parties if they chose, to agree with the bank that upon request of Milburn and Prahl or either of them loans should be made by the plaintiff bank upon the credit and responsibility of both; and if they did so agree, and if relying thereon loans were in good faith so made by the plaintiff bank to defendants or either of them, for use in conduct of the business of the defendants in which they were then engaged, the defendant Prahl would be liable thereon.

"You should consider whether the defendants were in business together in the nature of a partnership and what the agreement between the parties actually was; what the parties Milburn and Prahl and the bank said in reference thereto; what they did in and about their business, and what they now say as to their agreements and transactions; all as the same are shown by the evidence given at the trial, and from this determine the truth of the matter.

"So far as concerns the purpose or use to be made of the moneys loaned, the bank would not be bound to follow the same up so as to see to it that the moneys were actually applied to the ranch business in order to protect its own claim, but if the agreement therefor was made by both defendants as is alleged by the bank, then so long as the same remained unrevoked the plaintiff bank in making a loan would have the right to rely upon the statements,

if any, of the defendant then transacting the business as to the purpose for which the loan was desired or to be used; but if such loans or any of them were used or to be used for other purposes than the joint business of the parties, and the bank at the time of making the same knew such fact or in the exercise of ordinary care would have known it, then as to any loans so used and as to which the bank had such knowledge or notice it would not be authorized to recover herein in the absence of a specific agreement or approval thereof by defendant Prahl."

The objections to this instruction are not so much as to what it says, but what it fails to say. By the first paragraph the court states the questions to be whether defendant Prahl assumed responsibility for the sums loaned by the bank, and whether Prahl authorized such loans, agreeing on his part to be liable therefor jointly with Milburn as his own obligation, and to see that they were paid, and placed the burden of proof upon the plaintiff to establish "these facts before it would be entitled to a favorable verdict."

By the second paragraph the jury were told to consider the evidence given at the trial, that the contract alleged was competent for the parties to make, and if the loans were made relying upon such contract Prahl would be liable.

By the third paragraph the jury were told that they should consider whether defendants were in business together in the nature of a partnership, and what the agreement between the parties actually was, what the defendants said in reference thereto, and what they now say with reference to their agreements and transactions.

By the fourth paragraph the jury were told that if the agreement was made by both parties as alleged the bank would not be bound to see to it that the moneys were actually applied to the ranch business, but if the loans were used or to be used for other purposes and the bank knew such fact, or in the exercise of ordinary care would have known it, then the bank was not entitled to recover against Prahl in the absence of his specific approval thereof.

Bearing in mind the three grounds relied upon by plaintiff to establish liability against Prahl, it will be noted that no rules of law are set forth in the instructions as a guide to the jury in determining whether or not the relation between Milburn and Prahl was that of copartners; partnership in law or fact is not defined, nor is the jury instructed as to what facts must be proved by the plaintiff in order to establish the partnership.

Neither does the instruction inform the jury what facts are necessary to be proved in order to constitute a holding out as partners, nor upon which party rests the burden of proof with reference to such facts. No reference is made to the defense of the statute of frauds, the application of which would depend upon the construction to be put upon the language claimed to have been used by Prahl with regard to loans in question.

The instruction fails to state that the burden of proof is upon the plaintiff to show that the loans were made to the partnership, or upon the faith of a partnership induced by the statements of defendants that they were partners.

The notes in dispute were all signed by Milburn alone, and represent a balance due upon 60 or more notes for amounts ranging between $60 and several thousand dollars, and covering a period of over three years, representing loans made by the bank upon notes signed by Milburn alone, and of which transactions defendant Prahl testifies he had no knowledge until after all the loans had been made. Prahl lived at Pierce, Nebraska, about 150 miles from Spring Ranch where these transactions were held, and Milburn was his son-in-law. Prahl would come to Spring Ranch three or four times a year. Prahl's version of the transaction with the bank at the time was, as he claims, that he leased the farm to his son-in-law for a rental of one-half the profits of operation, and that he told the bank he would open an account with them in his own name, and that Milburn was authorized to draw upon the account, signing the checks Prahl, by Milburn, and if the account was overdrawn at any time the bank was to notify Prahl and

he would fix it. The evidence shows that many checks were so drawn by Milburn and paid by the bank.

Under these somewhat peculiar circumstances and the evidence produced by the parties, the three propositions by the plaintiff as a basis for the liability of Prahl become very close questions of fact, and it was the duty of the court by its instructions to aid the jury in reaching a correct conclusion by stating the rules of law applicable to the various claims of the plaintiff. This we think it failed to do by the instruction quoted. The jury were permitted to find a partnership, a holding out, or an oral agreement upon which to base their verdict, without any guidance by the court as to the rules of law governing each of those questions. The verdict being general, we are unable to determine upon which theory the jury found against the defendant, Prahl.

Appellee contends that, as defendant did not request instructions upon the law of partnership, the court was not required to give them, and that plaintiff was entitled to recover whether or not there was a partnership. The issue of partnership, actual or by holding out, was presented by the petition and evidence, and it was the duty of the court to present that question to the jury under proper instructions without any request. *Hessig-Ellis Drug Co. v. Harley Drug Co.*, 95 Neb. 267; *Giveen v. Matthews*, 118 Neb. 125; *Sandwich Mfg. Co. v. Shiley*, 15 Neb. 109.

As above pointed out, we cannot determine which ground of liability the jury selected as basis for their verdict; if partnership of either kind, then the instruction failed to state the law on that subject. We are therefore unable to say whether the verdict is right or wrong.

The next assignment of error is the refusal of the court to give instruction No. 1 asked by the defendant, as follows:

"The jury are instructed that, when one member of a partnership signs a note or makes a contract in his own name and not in the name of the firm, the presumption of law is that such note or contract is his own personal obligation, and not the obligation of the partnership. And

the burden is on the one seeking to enforce such contract or obligation against the partnership, not only to prove the existence of the contract, but to go further and to prove that the money for which the note was given or the consideration for which the contract was executed was advanced on the credit of the partnership.

"And as the undisputed evidence in this case shows that all the notes and contracts herein in question were made in the individual name of the defendant Milburn, if you find from the evidence that a partnership actually existed between the defendants Prahl and Milburn at the times herein in question or if you find said defendants held themselves out as partners at such times, and you fail to find that the moneys and credits herein in question were advanced by the plaintiff on the credit of the partnership, then your verdict should be for the defendant Prahl."

We think this instruction stated the law and should have been given. In view of the fact that all of the notes, on their face, were the individual obligation of Milburn, it was clearly incumbent upon the plaintiff to establish by a preponderance of the evidence that the money was advanced to and on the credit of the partnership *(Kempton v. People,* 139 Ill. App. 563) whether they found that a partnership existed or that Milburn and Prahl held themselves out as partners, and also, in the latter event, that they relied upon such holding out in making the loans. 47 C. J. 712, sec. 107. The individual signature of Milburn raised a strong presumption that the notes were his individual contracts, and it is incumbent upon the plaintiff to show that it was a partnership transaction. 47 C. J. 841, sec. 304.

Instruction No. 2, asked by defendant and refused, is substantially the same as No. 1 above quoted and should have been given if No. 1 was refused.

One of the principal questions for the jury to determine was whether the arrangement between Milburn and Prahl constituted a partnership relation, or that of landlord and tenant, and by instruction No. 3 asked by defendant and refused, the court was asked to instruct in effect that

the receipt of a part of the profits as rent for the use of property does not in itself constitute a partnership, and that farming contracts whereby the owner of land agrees with another that the land shall be occupied and cultivated by the latter each to furnish part of the seed, implements and stock, products to be divided at the end of a given term or sold and the proceeds divided, are not ordinarily construed as creating a partnership between the parties, in the absence of evidence clearly manifesting an intention to form a partnership.

Where a portion of the profits, gross or net, is to be received by one party as compensation for the use of his property, real or personal, this does not constitute a partnership. *Gillispie v. Bohling,* 107 Neb. 357, and cases cited. "An indefinite compensation out of profits for the use of property, real or personal and dependent upon the success of the business, is in lieu of rent and does not constitute the owner a partner *inter se.*" 1 Bates, Partnership, sec. 45.

This instruction is probably defective as requiring a greater degree of proof than a preponderance of the evidence, but we think that the defendant was entitled to an instruction correctly stating the rule of law on that subject. *Pospisil v. Acton,* 118 Neb. 200.

Although the court stated this proposition as one of the defenses, it gave no instruction as to the legal position of the parties if the jury found the facts as claimed by defendant.

This case has been tried to a jury three times with a verdict against the defendant every time and it is therefore with considerable reluctance that we find it necessary to reverse this judgment. We are informed by the appellant's reply brief that the instructions given upon the former trials were identical with those now under consideration, but we have not found it necessary heretofore to consider the instructions. The first verdict was set aside by the trial court and the second by this court for error in the rejection of evidence and undue restriction of the cross-examination of plaintiff's witnesses. We are, therefore,

compelled to disregard the outcome of the former trials, and, for error in the giving and refusal of instructions upon this trial, to reverse the judgment and remand the cause for further proceedings in accordance herewith.

REVERSED.

RAY EIDENMILLER, APPELLEE, V. STATE OF NEBRASKA: DEPARTMENT OF PUBLIC WORKS, APPELLANT.

FILED NOVEMBER 21, 1930. No. 27665.

1. **Master and Servant:** EMPLOYERS' LIABILITY ACT: APPEAL: JURISDICTION. Prior to July 24, 1929, which was the day the 1929 amendment thereof became effective, section 3060, Comp. St. 1922, conferred sole jurisdiction upon the district court for Lancaster county over appeals from the compensation commissioner in actions under the employers' liability law in which the state of Nebraska or the department of public works was a party. Whether the department of public works may, under any circumstances, properly be made a party, *quære?*
2. **States:** DEPARTMENT OF PUBLIC WORKS: ACTION: VENUE. Under the Civil Administrative Code, the department of public works is an executive and administrative agency of the state; and under section 22, art. V of the Nebraska Constitution, neither the state nor such direct agency of the state may be sued in any court upon which the legislature has not conferred jurisdiction over such suit.
3. ———: ACTION: WAIVER. The immunity provided by the Constitution and laws from suits against the state or against its direct agency is not waived by the appearance of the attorney general, by answer to the merits without preserving therein a plea to the jurisdiction, and by participation in the trial upon the merits.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Reversed, with directions.*

C. A. Sorensen, Attorney General, and *Clifford L. Rein,* for appellant.

George M. Harrington and *M. F. Harrington, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ.

GOSS, C. J.

This is a case under the employers' liability law. Ray Eidenmiller secured a judgment for compensation against the department of public works of the state of Nebraska. Defendant appealed. Eidenmiller cross-appealed because of the refusal of the court to allow the claimed balance on his doctor's bill.

On October 29, 1926, in Holt county, while appellee was employed under appellant, he was injured by the premature explosion of dynamite used in the construction of the public highway on which he was working. The parties agree that it arose out of and in the course of his employment, that he was entitled to compensation and was paid for 109 weeks. Then compensation ceased to be paid. Appellee began to enforce his alleged right. The proceeding was against the department of public works only. The state was not made a party to the proceedings before the compensation commissioner. A hearing was had before the state compensation commissioner at Lincoln, and on April 12, 1929, the commissioner made an award, ordering the employer to pay a bill for drugs and a doctor's bill for a certain amount and thereupon to be discharged; and finding and ordering that the employee had fully recovered and had received all compensation due as a result of his injuries.

The employee promptly appealed, filing his petition April 13, 1929, in the district court for Holt county. He alleged that "he was employed by the department of public works of the state of Nebraska, and thereby by the state of Nebraska." He made both the state of Nebraska and the department of public works of the state of Nebraska defendants. Two days later summons was duly served and on April 23, 1929, the defendants filed their special appearance objecting to the jurisdiction of the district court over them on the ground that the state was not a party to the original proceedings before the compensation commissioner and is not a proper party in this appeal, and on the ground (supported by an attached affidavit) that the department of public works of the state of Nebraska has

its domicil in Lancaster county, Nebraska, where, it recited, except by "consent, which is not given, the district court has exclusive appellate jurisdiction." On February 8, 1930, the plaintiff dismissed the state without prejudice to a future action. On March 21, 1930, the court overruled the aforesaid special appearance of the department of public works of the state of Nebraska, to which order it excepted; and on March 27, 1930, this, the only defendant remaining, answered to the merits of the petition. In this answer it did not plead over as to its privilege from suit in any county other than Lancaster. The answer shown in the transcript appears to have been signed by the attorney general, by one of his assistants, and by local counsel in Holt county, and to be verified in Lancaster county by the secretary of the department of public works. Trial to the court resulted in a judgment for compensation based on permanent disability for life.

Appellant assigns error in overruling the special appearance. In this court the settled rule, where private parties are litigants, requires a defendant, whose special appearance is overruled and who answers to the merits, to plead his objections to the jurisdiction in his answer. Otherwise, he waives the objection. *Gaines v. Warrick*, 113 Neb. 235; *Adams v. Guthrie & Co.*, 113 Neb. 192; *First Bank of Ulysses v. Warren*, 113 Neb. 361. Appellant urges that this rule does not apply here because the suit against the department of public works is in effect a suit against the state; that there was no jurisdiction to sue the state in any other county than Lancaster, where the state capital is; and that neither the attorney general nor the secretary of the department of public works has any power to waive this constitutional jurisdiction.

Section 22, art. V of the Constitution of Nebraska, provides: "The state may sue and be sued, and the legislature shall provide by law in what manner and in what courts suit shall be brought."

The legislature has provided: "The state may be sued in the district court of the county wherein the capital is

situated." Comp. St. 1922, sec. 1105, Comp. St. 1929, sec. 27-324.

The legislature has also provided with respect to the operation of the employers' liability law: "The provisions of this act shall apply to the state of Nebraska and every governmental agency created by it." Comp. St. 1922, sec. 3029. This was amended, without changing these words, in chapter 134, Laws 1927, now section 48-106, Comp. St. 1929. Also section 3038, subd. 1, Comp. St. 1922, amended by chapter 39, Laws 1927, defines an employee as: "Every person in the service of the state or any governmental agency created by it, under any appointment or contract of hire, express or implied, oral or written," etc. Comp. St. 1929, sec. 48-115.

The legislature further provided that all appeals from the award of the compensation commissioner "may be submitted to the district court of the county which would have jurisdiction of a civil action between the parties." Comp. St. 1922, sec. 3060. That provision was in effect when this appeal was taken. It is interesting to note that an act of the legislature was approved, without an emergency clause, on April 22, 1929, so amending section 3060, Comp. St. 1922, now section 48-137, Comp. St. 1929, as to require a compensation award to be heard on appeal in the district court of the county in which the accident occurred unless the parties shall stipulate in writing that it shall be heard in some other county. Laws 1929, ch. 81, sec. 1. This act did not go into effect until July 24, 1929, and so did not operate legally on the case under consideration as to jurisdiction of the appeal which was then pending in the district court.

The legislature declared the civil administration of the laws of the state to be vested in the governor and, "for the purpose of aiding the governor in the execution and administration of the laws," divided the "executive and administrative work" into six "departments of the state government." One of these is "the department of public works." Comp. St. 1922, secs. 7242, 7243. These sections were in force until July 24, 1929 (and therefore controlled

the present case), when they were amended. Laws 1929, ch. 51. This amendment did not disturb the assignment of duties to the department. Comp. St. 1929, sec. 81-101.

We have cited and quoted various sections of the statute rather fully in an effort to collect here, and record for the benefit of those who may read this opinion, the pertinent authority from the legislature, upon which must be determined whether this suit of the employee against the department of public works is a suit against the state.

We have had no case in this court where the questions have been raised and decided exactly as presented now. But *Nebraska National Guard v. Morgan*, 112 Neb. 432, is helpful. Morgan, while employed by the adjutant general of the state in charge of the annual encampment at Ashland, as one of the carpenters to prepare shed kitchens for each company, received an injury arising out of and in the course of his employment. Among other things it was contended by the state that Morgan was not an employee of the state of Nebraska. The opinion refers to the statutes relating to the organization of the active militia, making the governor the commander in chief and vesting control in the adjutant general, subordinate only to the governor, and holds that the Nebraska National Guard is a governmental agency of the state in the preparation for the encampment, and that Morgan was an employee thereof. The statutes of the United States make the National Guard a part of the regular army only while "in service of the United States." The National Guard was not in service of the United States when Morgan was injured. He was in the authorized employment of the National Guard, which the court described as "essentially a state institution." He was employed by the adjutant general, on work authorized by the legislature and paid for out of state funds provided by the legislature. The effect of the decision is to hold that the injured employee was an employee of the state through its agency, the Nebraska National Guard. There, as in the instant case, no point was sought to be made by the state, nor by its employing agency, that there was no primary liability against the agency as such, and therefore that the compen-

sation proceedings should have been brought against the state of Nebraska, as principal, rather than against its said agent by name. So, the question not having been raised here, we do not expressly decide whether the compensation proceedings should have been brought against the state rather than against the department of public works of the state of Nebraska alone. When such issue is properly raised and necessary to a decision we shall consider and decide it. But we are of the opinion that this suit was begun and was carried on, in effect, as a suit against the state, the defendant here being what is sometimes called a "direct agent" of the state, carrying on, in the language of the legislature, the "executive and administrative work" of the state duly assigned to this particular department. Indeed, as we have shown in the statement of the case, the employee alleged that "he was employed by the department of public works of the state of Nebraska, and thereby by the state of Nebraska."

The state was privileged from a suit against it in Holt county at the time this appeal from the award was carried on. The department of public works was likewise, in the circumstances, immune from suit in Holt county and the district court should have sustained its motion to quash the service upon it. But the appellee argues that, when the department of public works answered to the merits without pleading over as to the privilege, it waived this question of jurisdiction.

McShane v. Murray, 106 Neb. 512, was a case wherein plaintiff, the owner of certain land, sued defendant, a lessee of state school land. There was involved the question of the true boundary between the holdings. The suit was brought in Sheridan county. The state was made a party. Without interposing any objections, the state, through its attorney general, answered to the merits, went to trial, lost, and appealed, as did Murray, the lessee. In this court the state contended for the first time that there was no authority to sue it under the Constitution and laws and that the judgment was void. The opinion reviews section 22, art. V of the Constitution, and the statutes involved. It shows

that no act of the legislature has authorized the suit against the state. It rules that the appearance of the attorney general in behalf of the state and his failure to object to the jurisdiction did not so bind the state as to give the decree against it any validity. The rule is stated in the syllabus in these words: "Where by its Constitution the state is immune from suits against it except as the legislature otherwise provides, the immunity thus provided cannot be waived by a voluntary general appearance in the case and a participation in the trial thereof upon its merits by the attorney general in an unauthorized action brought against the state."

The principle involved is applicable here. Neither the attorney general nor the secretary of the department of public works had the power to waive the only venue then authorized by the legislature on appeals in a state compensation case, where the state was, in effect, the real party, and to transfer that venue from Lancaster county to Holt county. The Constitution vested that power in the legislature, and not in any law officer of the state or executive employee of the state. This in no way affects the rule as to private litigants stated in *Gaines v. Warrick*, and other cases, *supra*.

Having reached the conclusions stated, it is not necessary to go into the merits of the judgment of the district court on other matters complained of by the appellant nor by the cross-appellant. The judgment of the district court is reversed, with directions to dismiss the cause of the plaintiff, without prejudice to such procedure elsewhere as he may find it legally or practically desirable to pursue.

REVERSED.

JOSEPH H. MILES, APPELLANT, V. STEPHEN B. MILES ET AL., APPELLEES.

FILED NOVEMBER 21, 1930. No. 27426.

1. **Appeal.** Ordinarily, this court, in its appellate jurisdiction, will not pass upon an issue that is neither raised by the pleadings nor decided by the trial court.

2. Trusts. A trustee, accepting a trust, receiving and holding the trust property, will not be permitted to set up a claim of title in himself to such property.
3. Execution: TRUST PROPERTY. Where a spendthrift trust is created for a stated number of years, terminating on a day certain, after the expiration of the trust period, the trust property is freed from the conditions of the trust and is subject to seizure and sale on execution against the then owners of such property.

APPEAL from the district court for Richardson county: JOHN B. RAPER, JUDGE. *Affirmed.*

Wiltse & Wiltse and *George N. Foster,* for appellant.

F. A. Hebenstreit, Reavis & Reavis, I. E. Smith, John C. Mullen, Jean B. Cain, F. N. Prout and *Arthur F. Mullen, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ.

GOOD, J.

This is an action in equity, brought by Joseph H. Miles, as an individual and as trustee, against one of the beneficiaries of the trust, a number of judgment creditors of said beneficiary, and the sheriff of Richardson county, in which he seeks a construction of the trust instruments, and asks that the court determine that the judgments against the beneficiary are not liens upon the interest of the beneficiary in the trust property; that the sheriff be enjoined from levying executions on such property, and that plaintiff, as trustee, be authorized to make division of the trust property among the beneficiaries, free and clear of any incumbrance. He also asks for alternative relief in the event that the court finds that such judgments are liens on the interest of the defendant beneficiary in the trust property; that plaintiff, as an individual, be awarded a first lien for moneys advanced by him to the beneficiary. The sheriff and the beneficiary made default. The creditors answered, alleging the termination of the trust and asking that their judgments be adjudged liens upon the beneficiary's interest in the trust property. The court found against the plaintiff,

held that the trust had been terminated; that the judgment creditors were entitled to liens by reason of judgments upon the beneficiary's interest in the trust property, and fixed the priority of the liens. Plaintiff, in his dual capacity, has appealed.

On August 12, 1898, Stephen B. Miles executed a deed, conveying in trust to Joseph H. Miles, for the use and benefit of Stephen B. Miles, Jr., Joseph T. Miles, and Warren C. Miles, 1,755 acres of land situate in Richardson county. The trustee is a son of the grantor; the beneficiaries are sons of the trustee and grandsons of the grantor. The trust deed is too long and contains too many repetitions to be here reproduced in full. We shall quote from and refer to such of its provisions as are necessary to an understanding and determination of the questions raised.

The deed recites: "For and in consideration of my love and affection for my grandsons hereinafter named and in further consideration of the sum of One Dollar ($1.00) to me in hand paid I do hereby bargain, sell and convey unto my son Joseph H. Miles of the City of Falls City in said county in trust however, and as trustee for the use and benefit of my three grandsons, to wit: Stephen B. Miles, Jr., Joseph T. Miles and Warren C. Miles, * * * minor children of said Joseph H. Miles. * * * The said Joseph H. Miles, trustee, is to hold the said lands for the full period of thirty (30) years in trust for my said grandsons above named and herein conveyed to said Joseph H. Miles in trust for the full period of thirty (30) years from this date, to wit, from the 12th day of August, A. D. 1898, to the 12th day of August, A. D. 1928, and during that full period of time of thirty years from the date of this instrument this said land and every part thereof the whole (1,755) seventeen hundred fifty-five acres here conveyed in trust as aforesaid shall not be conveyed, mortgaged or incumbered by my said grandsons or either one of them nor by said trustee nor shall said lands or any part thereof nor the annual profits thereof so long as the same is held in trust and by the trustee or subject to the trustee's control be liable for any debt, duty or obligation of said grandsons or either

one of them nor shall said lands or any part thereof or any interest therein or the profits in the hands or control of the trustee be subject to any lien, attachment or legal proceedings of any kind whatsoever, save and except the just taxes thereon for the said trust period of time, to wit, for the full period of thirty (30) years from this date or until August 12th, A. D. 1928, as aforesaid, nor shall said trustee or his successors nor said beneficiaries or any one else during this said period of thirty (30) years, sell, alien, convey, incumber, assign, transfer or in any way put any claim directly or indirectly on said land here conveyed or any part thereof; nor shall said lands or any part thereof or the profits thereof, while in the hands or control of the said trustee or his successor, be liable to the creditors of my said grandsons, the beneficiaries of this trust during the whole period of the said thirty (30) years of time in which the said property is here placed in trust."

The deed further provides that, in case of the death of said Joseph H. Miles or in case of his inability or unwillingness to discharge the duties of the trust, the proper court shall appoint a trustee to carry out the terms of the trust. Another provision directs the trustee to pay the taxes, and it is further provided: "Said trustee shall take good care of said property and use it as a good, careful, prudent business man should use his own property and after paying all the taxes, repairs and expenses and insurance incident to the proper care of said property shall have for his services in the care of said estate the full twenty-five per cent. or one-fourth the net profits of said property to be deducted on the first of January of each year for and during said thirty (30) years * * * and the remainder of said profits shall be faithfully accounted for with my said grandsons * * * each of my said grandsons to share equally and alike in the division of the said annual net profits * * * during the years of their minority or while they are under guardianship * * * the said guardian shall receive the annual net profits into his own hands." It is further provided that after the grand-

sons become of age the payment of such net profits shall be made directly to them. The deed also provides that, in the event of the death of any of said grandsons, without issue, during the trust period, then his share shall go to the survivor, and, if any of the said grandsons die during the trust period, leaving issue surviving, such issue shall take the share of the deceased grandson; and a further provision is that, if all of the grandsons shall die without issue prior to the termination of the trust period, and if the said Joseph H. Miles, the trustee, shall have other sons, such trust property shall go to them.

Another provision of the deed is: "When the full trust period of time has expired, to wit, on the 12th day of August, A. D. 1928, or as soon thereafter as it can be done, I desire said lands to be then equally divided between my said three grandsons, Stephen B. Miles, Jr., Joseph T. Miles and Warren C. Miles, the beneficiaries of this trust, free, clean and clear of all liens, incumbrances and claims of every nature whatsoever, and my said grandsons are to share equally and alike in the division of said lands; the said lands to be theirs, their heirs and assigns forever."

After many repetitions as to the trust period and the purpose of the trust, the deed contains the following emphasizing provision: "I declare here, as emphasized and the predominant and most important intention of this deed and conveyance, is to put this property here conveyed in trust for said time the full period of thirty (30) years from this date as aforesaid and during all of said time this said property here conveyed shall not be alienable or chargeable with the debts or obligations of my said grandsons, the beneficiaries or either one of them and neither the voluntary act of my grandsons or either one of them nor of their creditors or creditor nor suitor or suitors shall directly or indirectly through any proceedings by court or otherwise touch, effect or foster any lien or claim whatsoever upon the said land or any part thereof or the annual profits thereof, while in the hands of said trustee or his successor or successors holding the same as trustee in trust as aforesaid for the whole period of thirty (30) years from this

date this land here conveyed shall be and remain in trust, free and clear of all liens, mortgages, judgments, claims and demands save and except the just taxes."

The deed also contains this covenant: "I here covenant with the said Joseph H. Miles, trustee, and said three (3) grandsons that I am lawfully seised of said premises and have the lawful right to sell and convey the same and said premises are free and clear of all liens and incumbrances except the taxes of this fiscal year, A. D., 1898, and not yet payable and I will warrant and defend the same against the lawful claims of all persons whomsoever. I intend in this conveyance that this said property here conveyed shall be and remain in trust as aforesaid for the full period of thirty (30) years from the date of this instrument."

Joseph T. Miles, one of the beneficiaries, departed this life in 1912, without issue, so that but two of the beneficiaries survive. While both of the beneficiaries are named in the petition as parties defendant, Stephen B. Miles, Jr., was not served with process and made no appearance in the case. He is, therefore, not a party to this litigation.

On August 15, 1898, three days after the date of the trust deed, Joseph H. Miles, in writing, accepted the trust created, and for the full 30-year period has acted as trustee and been in possession of the trust property, carrying out its terms. Shortly after August 12, 1928, the beneficiaries, by deeds, conveyed the trust property to Joseph H. Miles. It appears that this was done for the purpose of enabling him to obtain a loan upon the lands, with which one of the beneficiaries might discharge his existing obligations. Not being able to procure the loan, Joseph H. Miles made and executed two deeds, each conveying an undivided one-half interest in the lands to each of the two surviving beneficiaries. In the deed from Joseph H. to his son, Warren C., it is recited that the intention is to reconvey whatever title he has received by reason of the deed from Warren C. to himself.

It appears from the evidence that Stephen B. Miles, Sr., died in the year 1898, testate, and that Joseph H. Miles, the plaintiff in this action, was made residuary legatee and

devisee. Joseph H. Miles, as an individual, now argues in this court that the trust deed is void because it violates the rule against perpetuities, and that, by reason of being residuary legatee and devisee under the will of his father, the title to the lands thereby passes to him. It is sufficient answer to this to say that nowhere in the petition filed by plaintiff is any attempt made to claim any title or interest in the property save and except a possible lien upon the lands for moneys advanced to Warren C. Miles.

This court has frequently held that a case must be tried in this court on the issues presented to the trial court for decision. As we view it, this issue was not raised by the pleadings, was not presented to nor decided by the trial court. Hence, we are not bound to consider it. However, had the plaintiff so attempted, by his pleadings, to present this issue in the case, he would have been confronted by the proposition that a trustee cannot accept and act as trustee under a trust deed and, while so acting, attack the trust as invalid.

The rule applicable is stated in Perry on Trusts (7th ed.) sec. 433, in the following language: "Under no circumstances can a trustee claim or set up a claim to the trust property adverse to the *cestui que trust.* Nor can he deny his title. If a trustee desires to set up a title to the trust property in himself, he should refuse to accept the trust." And in the same work, at section 863, we find the following: "Lord Justice Knight Bruce said, that where one entered into possession as trustee, he could not be permitted to set up a possession or title in himself adverse to the *cestui que trust.* (Where a person enters into possession without other title than that conferred upon him by the trust instrument, the presumption is that he took possession as trustee and continues to hold in that capacity.) It is the duty of the trustee, if he intends to claim the estate, to resign his trust and deliver over the possession which he received as trustee."

In the instant case, plaintiff not only accepted in writing, but continued to act as trustee for the full 30-year period, and, after its expiration, brings this action as trustee, seek-

ing to have his duties as trustee determined by the court. Under the record here presented, plaintiff, as an individual, is precluded from asserting title to the trust property.

We will now consider the title conveyed, respectively, to the trustee and the beneficiaries. The trust deed conferred upon the trustee the right of possession and the management of the trust property for a period of 30 years, ending on August 12, 1928.

"Every estate which must expire at a period certain and fixed in advance, by whatever words created, is an estate for years; every such estate must have a certain beginning and a certain end." 10 R. C. L. 662, sec. 19. In reality, the grantee of such an estate is a lessee. On the expiration of the period, the estate terminates; the grantee's right of possession and control ceases; he then has nothing to convey. Counsel for plaintiff insist that, under the deed, the duty rested upon the trustee to make conveyance of the lands to the beneficiaries, and that, according to the terms of the trust, he could not make such conveyance until the lands were free and clear of all liens. It is sufficient answer to this to say that nowhere in the deed is the duty imposed upon the trustee to make conveyance of the land to the beneficiaries. He is not required to make division between them, nor required to make any conveyance of any sort.

In 26 R. C. L. 1210, sec. 52, we find this rule stated: "On the termination of the period of time to which an active trust is limited by the terms of its creation, the trust ceases and the estate becomes vested in the parties entitled to it at that time, by operation of law and without a conveyance." Other authorities supporting this rule are *Kohtz v. Eldred,* 208 Ill. 60; *Eakle v. Ingram,* 142 Cal. 15, 100 Am. St. Rep. 99; *Schaal v. Schaal,* 203 Ia. 667.

We conclude that the estate of the plaintiff as trustee, including all his rights and duties imposed by the trust deed, terminated on the 12th day of August, 1928, and that no conveyance from him was necessary to vest title in the beneficiaries.

It is evident that the deed from Stephen B. Miles, Sr., to his son Joseph, as trustee, and the grantor's grandsons

conveyed all of the estate that the grantor had. The beneficiaries took an estate which is properly denominated a determinable fee in remainder, subject to the estate for years vested in the trustee. A determinable remainder in fee, or an estate in fee, is one that may ripen into a fee simple, or it may be defeated by the happening of some contingency. In the instant case, if the grandsons survived during the full trust period of 30 years, the estate became theirs absolutely, and, on the other hand, if any one of them died before the expiration of the trust period, the estate of such deceased terminated and the title went elsewhere, as provided by the deed. We reach the conclusion that at the expiration of the trust period the two surviving grandsons, Stephen B. Miles, Jr., and Warren C. Miles, became vested with title in fee simple to the lands.

On August 12, 1918, Joseph H. Miles, the plaintiff, and his wife executed a deed conveying land in trust to Joseph H. Miles for the use and benefit of Stephen B. Miles, Jr., and Warren C. Miles, sons of the plaintiff. This deed of trust incorporated and made all of the provisions of the deed from Stephen B. Miles, Sr., to Joseph H. Miles et al. a part of the latter deed, save and except as to the period of time. The trust period in the second deed was for 10 years, beginning August 12, 1918, and terminating August 12, 1928. The conclusions reached with reference to the deed executed by Stephen B. Miles, Sr., apply to and govern the disposition of the property conveyed by the trust deed made by Joseph H. Miles and wife to Joseph H. Miles, as trustee, for the use and benefit of his two sons.

Plaintiff argues that, since some of the claims of the creditors, who are parties to this action, were incurred prior to the termination of the trust period, they cannot be made liens upon the trust property. There are two answers to this contention. The first is that, while a spendthrift trust was created by the instrument, the period of the trust was for 30 years and 10 years, respectively, in the two deeds. Both trusts ceased on August 12, 1928. Thereafter, the lands were free to be dealt with by the beneficiaries as they saw fit. They could then have sold and con-

veyed a good title, or they could have mortgaged or incumbered the same in any manner that they desired. The property was then subject to execution or attachment the same as any other property that they had acquired. But another answer is that the question cannot be raised by the trustee. That question can be raised alone by the beneficial owners of the trust property.

With reference to the right of the plaintiff to have advances, alleged to have been made by him to Warren C. Miles, declared a first lien upon the lands, we find nothing in the record which would create such a lien, and, in fact, while that question was raised and presented in the trial court, it was not discussed in the briefs and seems to have been abandoned in this court. In any event, it is without merit.

We find no error in the record. The judgment is

AFFIRMED.

SCOTTSBLUFF NATIONAL BANK, APPELLANT, V. JOHN H. PFEIFER ET AL., APPELLEES.

FILED NOVEMBER 21, 1930. No. 27434.

Mortgages: PETITION FOR DEFICIENCY JUDGMENT. Where, in a suit to foreclose a real estate mortgage, after decree, exhaustion of mortgage security by sale, and confirmation thereof, the mortgagee files, in the same court, a petition in usual form except for the title, asking for a deficiency judgment against the mortgagor, such petition should be treated as a continuation of the foreclosure action. Under such circumstances, it is not necessary that the mortgagee first obtain an order of the court authorizing the prosecution of such application for deficiency, and the provisions of section 9210, Comp. St. 1922, are without application.

APPEAL from the district court for Scotts Bluff county: EDWARD F. CARTER, JUDGE. *Reversed, with directions.*

Mothersead & York, for appellant.

J. L. Grimm, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

THOMPSON, J.

This is an appeal from a dismissal of an action commenced June 6, 1929, to recover a deficiency judgment under our foreclosure of real estate mortgage statutes. The Federal Land Bank of Omaha owned a first mortgage on certain lands of the Pfeifers in Scotts Bluff county, Nebraska, and the Scottsbluff National Bank owned a second mortgage executed by the same parties on such lands. The owner of the first mortgage instituted an action in the district court for such county to foreclose the same, making the Pfeifers and the Scottsbluff National Bank parties defendant. Such latter bank filed its answer and cross-bill seeking to foreclose in the same action its mortgage. At the trial, decree of foreclosure, order of sale of the lands, and application of the proceeds according to the above indicated priorities were entered. Sale was had, confirmed, and proceeds applied. After such application there remained due, unpaid and owing from the Pfeifers to the Scottsbluff National Bank, $1,665.91. Shortly thereafter the present suit was begun in the aforesaid court by such Scottsbluff National Bank against the Pfeifers as defendants, seeking a recovery of a deficiency judgment against them for the aforesaid sum of $1,665.91. The petition reflected as a basis for the action a history similar to that heretofore set out, and was in the usual form of an application for a deficiency judgment lodged in an original action after decree and sale were had, except the title. By proceedings duly had, however, an order of attachment and summons in garnishment was issued, and the same was served on the Platte Valley State Bank of Scottsbluff, which bank filed an affidavit of interpleader herein showing that it had in its hands $1,965 deposited in the name of the defendant Anna M. Pfeifer, but that each of such Pfeifers claimed an interest in the money. Thereafter on February 5, 1930, the Scottsbluff National Bank, hereinafter called appellant, filed a motion praying for an order of the court authorizing it to

maintain this action and upon such order being made to allow appellant to amend its petition showing that such authority had been obtained. The motion further stated that appellant was "willing that this action shall be tried either as a suit in equity as a continuation of the mortgage foreclosure proceeding mentioned in its petition herein, or as an action at law, as may be determined by the court, and does not insist that this action be tried as an action at law but is willing to try this action as a suit in equity without a jury."

On February 8, 1930, defendants Pfeifer, neither of whom had at that time been served with summons, as evidenced by the record, demurred to appellant's petition on the following grounds, in substance: First, the petition fails to state facts sufficient to constitute a cause of action; second, such petition does not show that a court order was ever obtained authorizing appellant to prosecute this action at law to recover the balance of the alleged mortgage debt remaining after the foreclosure of the mortgage securing the same. On February 8, 1930, the matter was submitted to the trial court on the motion of the appellant and the demurrer of the Pfeifers; the former being overruled by the court and the latter sustained. Plaintiff, appellant, elected to stand on the record, and judgment of dismissal of the action was entered; to reverse which it appeals. The defendants Pfeifer make no appearance in this court by way of brief or otherwise, although due and legal notice was issued and served on each of them.

It will be noticed that appellant's motion was lodged before the Pfeifers had been served with summons; further, that the appearance of the Pfeifers by demurrer was voluntary and general, thus the court had jurisdiction of the parties and the subject-matter and could hear and determine the action as one in equity, for, as we conclude, the motion of appellant, considered in connection with the petition, was equivalent to an application by it requesting that the present action (application for deficiency judgment) be treated as a continuation of the original foreclosure suit, and the trial court should have so ruled. If it

had so concluded it would have been clearly within our holding in *Bennett v. Winegar*, 103 Neb. 843, wherein we stated: "An application for a deficiency judgment that is treated as a continuation of the original mortgage foreclosure action does not come within the meaning of section 8257, Rev. St. 1913, which provides that such proceeding must first be authorized by the court."

It must be remembered that this state has reached a stage in its jurisprudence when mere technicalities are not ordinarily permitted to create a condition which would deny to a litigant a speedy and efficient determination of justiciable facts. The legislature must have had this thought in mind when it enacted section 8657, Comp. St. 1922, which provides: "The court, in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

In connection with what has been said herein we might add: The motion of appellant should have been decided at the time filed, if reasonably convenient. Then, continuing our observations, the petition was not vulnerable to the demurrer interposed, as the action reflected by such petition was, under this record, but a continuation of the original foreclosure suit, and not an independent action at law. Being such, it was not necessary that the appellant first obtain an order of court permitting the prosecution of the present action. Hence, section 9210, Comp. St. 1922, which provides: "After such petition (for foreclosure of a real estate mortgage) shall be filed, while the same is pending, and after a decree rendered thereon, no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the court," is without application.

The judgment of the trial court is set aside in its entirety, and the cause remanded, with directions to such trial court to sustain the motion of appellant, overrule the demurrer of defendants Pfeifer, enter an order directing that this pre-

sent action proceed as a continuation of the original foreclosure suit, and grant the defendants Pfeifer time within which they may plead.

REVERSED.

S. J. LARSON ET AL., APPELLEES, V. ALFRED WEGNER ET AL., APPELLANTS.

FILED NOVEMBER 21, 1930. No. 27777.

1. Appeal: FILING TRANSCRIPT: JURISDICTION. The method of procedure to invoke the appellate jurisdiction of the supreme court is prescribed by section 9138, Comp. St. 1922. It is by filing in the supreme court a transcript of the proceedings of the lower court within three months from the date of the rendition of the final order.
2. ———: JURISDICTION. The supreme court, except in those cases wherein original jurisdiction is specially conferred upon it by section 2, art. V of the Constitution, exercises appellate jurisdiction only, and such appellate jurisdiction can only be conferred in the manner provided by statute.
3. ———: FILING TRANSCRIPT: NEGLECT OF OFFICER. If the delay in filing the transcript in the appellate court is caused, without the fault of the appellant, solely by the act or omission of the court official charged with a duty in connection with the preparation and filing thereof, it may be allowed to be filed after the expiration of the prescribed time.
4. ———: ———: NEGLECT OF APPELLANT. However, if the negligence of the appellant or his agent concurs with that of such a court official, it precludes an appeal.
5. ———: ———: ———. If the appellant relies upon the court official to file the necessary transcript and perfect an appeal, where said act is not the duty of said official, he makes such official his agent for that purpose and the negligence in filing or failing to file is that of appellant.
6. ———: ———: NEGLECT OF AGENT. When appellant selects an agent, such as the United States mail, to transport and deliver his transcript to the clerk of the supreme court, the negligence of his agent is the negligence of the appellant. The time of filing is determined by the time it arrives at the clerk's office, rather than the time when it was posted.

APPEAL from the district court for Knox county: CHARLES H. STEWART, JUDGE. Motion to require clerk to file transcript. *Motion denied.*

M. F. Harrington, George M. Harrington and *J. F. Green,* for appellants.

Peterson & Barta and *F. S. Berry, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

DAY, J.

This case is before the court upon a motion to require the clerk to file a transcript of the record as under date of October 18, 1930, which was the last day provided by statute for filing said transcript. It was, in fact, delivered to the clerk's office, October 20, 1930. The appellant fairly establishes by affidavits that the transcript was mailed at the post office at Creighton, Nebraska, on October 17, 1930, in time to reach Lincoln, the city in which the court is holden, on the same day; and that another mail train left Creighton, which should have brought it to Lincoln on the morning of October 18, 1930. The question presented to us is whether the failure of the United States mail to deliver the transcript entrusted to it in time for delivery, in the usual and regular course of the mails, excuses the failure of the appellant to file it within the time provided by statute.

The proceedings for invoking the appellate jurisdiction of the supreme court in civil cases is prescribed by section 9138, Comp. St. 1922. This section provides that the proceedings to obtain a review shall be by filing a transcript of the proceedings of the lower court within three months from the date of the final order, and that the filing of such transcript shall confer jurisdiction upon the supreme court. By this statute the legislature has made the filing of the transcript necessary to invest the court with jurisdiction. It has provided a time limit within which an appellant may thus invoke said jurisdiction. The rule is that, no transcript of the proceedings in the district court having been filed in this court within three months from the rendition of the final order, this court acquires no jurisdiction. This view was early adopted by this court. *Verges v. Roush,* 1

Neb. 113. It has been maintained through all the years in an unbroken line of decisions down to *State v. Amsberry*, 104 Neb. 273, and *Frazier v. Alexander*, 111 Neb. 294. The supreme court, except in those cases wherein original jurisdiction is specially conferred upon it by section 2, art V of the Constitution, exercises appellate jurisdiction only, and such appellate jurisdiction can only be conferred in the manner provided by statute. The great weight of authority in the United States is in accord with this rule, where similar statutes and constitutional provisions are in force. *Wehrs v. Sullivan*, 187 S. W. (Mo.) 825; *Hale v. Belgrade Co., Ltd.*, 74 Mont. 308; *Peterson v. Beals*, 102 Or. 245; *Coffee v. Harris*, 27 Wyo. 494; *Kudelle v. Vizzard Investment Co.*, 194 Ky. 604. See, also, 3 C. J. 1040, sec. 1032, and the exhaustive list of cases there cited.

The only exception that has been made to the above rule and the only excuse which has been held sufficient to entitle the appellant to a review of the judgment of the lower court in this state has been where the appellant was free from neglect and was prevented from having his appeal docketed by the appellate court within the statutory period through the neglect or failure of the proper officer to prepare the transcript. In such a case we have held that a party will not be deprived of his appeal. *Omaha Coal, Coke & Lime Co. v. Fay*, 37 Neb. 68; *Cheney v. Buckmaster*, 29 Neb. 420; *Continental Building & Loan Ass'n v. Mills*, 44 Neb. 136; *Drexel v. Reed*, 65 Neb. 231; *Sanders v. Nightengale*, 109 Neb. 667. This rule has been adopted by the court in the furtherance of justice. We have held that, where the appellant has done all things necessary, he cannot be deprived of his appeal by the negligence or fault of the officers of the court whose duty it is to prepare the transcript.

We have also held that, in the case of an appeal from the county court to the district court, where the appellant has done every thing required of him to perfect his appeal, and the statute makes it the duty of the county judge to file the transcript, his negligence in failing to do so does not deprive the appellant of the right of appeal.

Drexel v. Reed, supra; 3 C. J. 1072, sec. 1079. The rule is different, however, if it is only the duty of the county judge to prepare the transcript and the duty of the appellant to file the same. If the appellant in this case relies upon the county judge to file the same, he makes him his agent for that purpose, and the negligence of the county judge in filing or neglecting to file the transcript is that of the appellant. *Stewart v. Raper,* 85 Neb. 816; *Oppenheimer v. McClay,* 30 Neb. 654. See, also, Elliott, Appellate Procedure, p. 91 *et seq.* The rule applicable in these cases may be stated thus: If the delay in filing the transcript in the appellate court is caused without fault of the appellant solely by the act or omission of the court official charged with a duty in connection with the preparation and filing thereof, it may be filed after the expiration of the prescribed time. However, if the negligence of the appellant or his agent concurs with that of such a court official, it precludes an appeal. If the appellant relies upon the court official to file the necessary transcript and perfect an appeal, where said act is not the official duty of said official, he makes such official his agent for that purpose, and the negligence in filing or failing to file is that of appellant.

In the showing made in support of the motion in this case, there is no attempt to excuse the failure to file the transcript in this court within the time provided in the statute on account of the failure or negligence of the officer preparing the transcript. There is nothing to indicate that the transcript was not prepared promptly and without delay by the clerk of the district court. When the officer has prepared the transcript and delivered it to the appellant or his attorney, he has performed every official duty required of him by law. The appellant selected the United States mail for the purpose of transporting the transcript from Creighton, Nebraska, to the office of the clerk of the supreme court in Lincoln, Nebraska. It is stated in the affidavit, and we assume that it is the fact, from the time the transcript was deposited in the postoffice at Creighton, Nebraska, there was ample time in the

usual course of the mail to deliver the same to the clerk of the supreme court within the time limit. The appellant had thus selected the United States mail as his agent to transport and deliver the transcript to the office of the clerk of the supreme court. The agent was selected by the appellant, and the negligence of the agent, if any, was the negligence of the appellant. We think this situation is analogous to that where the appellant constituted the county judge his agent to deliver a transcript to the clerk of the appellate court when the delivery of that transcript is not a duty by statute. Again, we have a situation analogous to that in *State v. Marsh, ante,* p. 287, in which Goss, C. J., decided, in a special statutory proceeding, that mailing was not equivalent to filing with an official where the statute provided the time within which this filing should be made.

The only excuse heretofore recognized by this court sufficient to excuse the appellant for failure to file a transcript has been the neglect of officers whose official duty it was to prepare that transcript. The showing made in this case does not bring it within the exception to the rule. The motion in this case ought to be denied upon the authority of *State v. Amsberry,* and *Frazier v. Alexander, supra.* In conformity to this conclusion, the motion requiring the clerk to file the transcript of the record as under date of October 18, 1930, is denied.

MOTION DENIED.

SIDNEY A. TROBOUGH V. STATE OF NEBRASKA.

FILED NOVEMBER 21, 1930. No. 27469.

1. Process: SERVICE BY COUNTY CLERK: STATUTE MANDATORY. Section 5014, Comp. St. 1922, providing that upon the filing of an affidavit with the clerk of the court by a party or his agent that "he believes the sheriff of such county will not, by reason of either partiality, prejudice, consanguinity or interest, faithfully perform his duties in any suit commenced, or about to be commenced, in said court, the clerk shall direct the original or other process in such suit to the county clerk who shall execute the same," *held* mandatory.

2. Jury: SERVICE OF PROCESS: DISQUALIFICATION OF SHERIFF. An affidavit having been filed in conformity with such statute, the sheriff, *ipso facto*, was disqualified from serving process in the case.
3. ———: DRAWING PANEL. Such disqualification does not extend to the participation by the sheriff with the clerk of the court in drawing the panel of jurors from a box containing the names of jurors selected by the board of county commissioners.
4. Criminal Law: JURORS: DISQUALIFICATION. All jurors summoned by the sheriff after the filing of such affidavit in any case are disqualified to sit therein, and a timely challenge to the array or motion to quash the panel will be sustained as to that case, and a refusal by the court so to do is ground for reversal.
5. ———: INSTRUCTIONS. It is the duty of the court upon request to instruct the jury upon defendant's theory of the case if there is some evidence to support it, especially in a criminal prosecution where the state relies wholly upon circumstantial evidence.
6. ———: CIRCUMSTANTIAL EVIDENCE. In a criminal prosecution where the state relies wholly upon circumstantial evidence, it is error to refuse a cautionary instruction on that subject. *Wakeley v. State*, 118 Neb. 346.

ERROR to the district court for Adams county: J. W. JAMES, JUDGE. *Reversed.*

F. L. Carrico, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Homer L. Kyle, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and REDICK, District Judge.

REDICK, District Judge.

Upon an information charging defendant with murder in the first degree, he was convicted of murder in the second degree and sentenced to the penitentiary, and now presents his appeal from said judgment to this court. Defendant was convicted of having murdered his wife by shooting, in the dining room of their home, at a time when defendant, his wife and small baby and one Tooley, a lodger, were the only persons in the house. No extended statement of the facts is necessary for the proper understand-

ing of the questions presented. Reference to certain pertinent facts will be made in the discussion of some of the assignments. Defendant presents a number of assignments of error, only three of which we deem it necessary to consider.

The first assignment is that the court erred in overruling defendant's objections and challenge to the regular panel of jurymen. This involves the construction of sections 5013 and 5014, Comp. St. 1922, which are as follows:

Section 5014: "Whenever any party, his agent or attorney shall make and file with the clerk of the proper court an affidavit stating that he believes the sheriff of such county will not, by reason of either partiality, prejudice, consanguinity or interest, faithfully perform his duties in any suit commenced, or about to be commenced, in said court, the clerk shall direct the original or other process in such suit to the county clerk who shall execute the same in like manner as the sheriff might or ought to have done, and if like objections shall be made to the county clerk by either party, the court shall appoint some suitable person to whom such objection does not apply."

Section 5013: "Every county clerk shall serve and execute process of every kind, and perform all other duties of the sheriff, when the sheriff shall be a party to the case, or whenever affidavits shall be made and filed as provided in the next succeeding section; and in all such cases he shall exercise the same powers and proceed in the same manner as prescribed for the sheriff in the performance of similar duties."

On December 14, 1929, prior to the drawing of the jury panel for the January, 1930, term of court at which defendant was tried, an affidavit by his attorney was filed with the clerk of the district court, the material portion of which is as follows: "This affiant says that Raymond L. Crosson, sheriff of Adams county, Nebraska, is a witness for the state and was such witness at the former trial and was a witness on the motion for rehearing; that by reason of partiality and prejudice and interest in the result of this action this affiant believes said Crosson will

not faithfully perform his duties as such sheriff in drawing the jury panel and selecting, summoning and handling either the regular jury or any talesmen that may be required to be drawn or summoned," and ended with a request that the court order the duties usually performed by the sheriff to be done and performed by the county clerk. The filing of this affidavit was not brought to the attention of the court until a few days prior to the case being called for trial and decision of the point was not had until the case was called and the jury about to be impaneled when defendant filed objections to the regular panel of jurors upon the ground that the affidavit required by section 5014, Comp. St. 1922, had been filed, and that the sheriff was thereby disqualified from drawing said jury and acting in said case, and requested the court to order a new panel for the trial of said case. The objections were overruled, to which defendant excepted, and the case proceeded to trial.

It appears from the record that, notwithstanding the filing of such affidavit, the clerk and the sheriff, as required by law, from a box containing the names of 60 persons selected by the board of county commissioners to act as jurors, drew 24 names of persons to constitute the regular panel for trial of cases at the January term. The writ for summoning these jurors was addressed to the sheriff by the clerk and the sheriff personally served the persons drawn as jurors. The original panel having been exhausted, the court ordered the sheriff and clerk to draw from the box 24 additional jurors, which was done, the sheriff personally serving such additional jurors. The contention of the defendant is that the filing of the affidavit operated of itself to disqualify the sheriff from drawing and serving jurors for the trial of the defendant, and that the jurors so called and served were incompetent for that purpose. The correctness of this proposition depends upon whether the statute above quoted is mandatory or directory; if the former, the objection is well taken, otherwise not.

The undoubted purpose of the above quoted sections was to provide for the service of process and the performance of other duties of the sheriff by some person free from bias or prejudice in the case concerned where, on account of such bias and prejudice the sheriff was disqualified to act. The section applies to both civil and criminal proceedings. *Kelliher v. People*, 71 Colo. 202.

There would seem to be no question from the terms of the enactment that no discretion is vested in any person or tribunal, but that the provisions are mandatory. Section 5014, Comp. St. 1922, recites that, when the affidavit required is filed with the clerk of the proper court, "the clerk shall direct the original or other process in such suit to the county clerk who shall execute the same in like manner as the sheriff might or ought to have done, and if like objections shall be made to the county clerk by either party, the court shall appoint some suitable person to whom such objection does not apply." And section 5013, Comp. St. 1922, requires the county clerk to perform the duties of the sheriff in such cases.

In the construction of the statutes, the word "shall" is ordinarily considered as mandatory (*Jefferson County Farm Bureau v. Sherman*, 208 Ia. 614), and is always so considered when the statute is addressed to public officials. *McDunn v. Roundy*, 191 Ia. 976. Our attention has been called to and our research has discovered but one other state having a statute substantially the same as the one under consideration, to wit, Colorado, which is as follows:

"Whenever any party * * * shall make and file with the clerk of the proper court an affidavit stating that he believes that the sheriff of such county will not by reason of either partiality, prejudice, consanguinity or interest, faithfully perform his duties in any suit commenced * * * in said court, the clerk shall direct the original or other process in such suit to the coroner, who shall execute the same in like manner as the sheriff might or ought to have done." Rev. St. Colo. 1908, sec. 1299. . This statute was held to be mandatory and did not authorize the opposing party to file counter affidavits nor authorize the court to

exercise its discretion in granting or refusing such motion. *Litch v. People,* 19 Colo. App. 433. That was a civil case, but has been followed and approved by the supreme court of that state in both civil and criminal cases. See *General Film Co. v. McAffee,* 58 Colo. 344; *Kelliher v. People,* 71 Colo. 202; *Hoffman v. People,* 72 Colo. 552; *Daugherty v. People,* 78 Colo. 43. The precise question has not been before this court until now. In *Osborn v. Shotwell,* 33 Neb. 348, however, a statute providing that a case before a justice of the peace *shall* be transferred when either party files affidavit that he believes the justice prejudiced was held mandatory, the court saying: "It is not for him (the justice) to say whether or not he is biased, nor is it necessary to establish bias before a change can be ordered. All that is necessary is for the defendant, his agent or attorney, to make oath that the 'defendant cannot, as affiant verily believes, have a fair and impartial hearing in the case on account of the interest, bias, or prejudice of the justice.'" In *Hurford v. City of Omaha,* 4 Neb. 336, a provision that the grade of a street *shall* not be changed until damages paid was held mandatory; and in *State v. Buffalo County,* 6 Neb. 454, the word "may" was construed as mandatory where power is given to a public official and the public interests or individual rights call for its exercise.

The defendant cites *Policky v. State,* 113 Neb. 858. In that case the sections under consideration were quoted, but no affidavit had been filed prior to the drawing of the panel and the objections of the defendant were held in time because they were made to a special panel, the court saying: "It will be observed that, when a showing is made conforming to the provisions of the statute above referred to, it is then mandatory that the clerk direct the county clerk to perform the duties of the sheriff. In the case at bar, the defendant had no opportunity to make objections to the sheriff selecting and summoning the special panel until after he had done so." And the record in that case having shown that the sheriff was the prosecuting witness, and that a conviction of defendant would turn upon a question of veracity between the sheriff and

the defendant, it was held the objections to the special panel should have been sustained. The part of the opinion above quoted may be dictum, but states the law as we now declare it.

The state relies upon the case of *Noonan v. State,* 117 Neb. 520, in which it was held that where the sheriff is not the prosecuting witness or sole witness in a criminal case, and his testimony is merely corroborative, the fact that he is a witness does not disqualify him from performing the duties of his office; but in that case no affidavit had been filed as required by section 5014, Comp. St. 1922, and moreover, in the present case, the evidence of the sheriff was more than merely corroborative, though we do not place our decision upon that ground.

McCandless v. Commonwealth, 170 Ky. 301, also cited by the state, is not in point for the reason that no statute similar to ours existed in that state, but the only statute bearing upon the question was section 193 of the Criminal Code of Kentucky providing that the court may for sufficient cause designate some officer or person other than the sheriff to summon petit jurors, thus vesting the court with a discretion in the matter, while the statute under discussion states the conditions upon which the courts shall be required to act in a certain manner.

As above intimated, we are unable to discover any reason for holding the statute in question other than mandatory, neither have we been able to find any decision authorizing a contrary conclusion. It was therefore prejudicial error for the district court to overrule defendant's objections to the array, which was the proper method to raise the question. *People v. LeDoux,* 155 Cal. 535; *State v. Jordan,* 19 Idaho, 192. We must not be understood, however, as holding that the sheriff was disqualified from participating with the clerk in the drawing of the panel. Section 5014, Comp. St. 1922, merely disqualifies him from serving process and section 5013, Comp. St. 1922, was evidently not intended to enlarge the disqualifications provided in said section 5014, but merely to authorize the county clerk to act in the matters specified. And while

we think the sheriff would be disqualified from selecting and serving a special venire, there was no error in permitting him during the trial, in connection with the clerk of the court, to draw additional names from the box, as this involved no discretion of selection, but was a purely ministerial duty (*State v. Aspara,* 113 La. 940) with the performance of which the bias of the sheriff could have no logical relation.

While our conclusions upon the above question require a reversal of the judgment in view of the fact that another trial is likely to be had we deem it proper to discuss briefly two other assignments of error, and, first, the refusal to give instruction No. 6 requested by the defendant in the following language:

"You are instructed that evidence has been introduced and received in this case tending to show that some one else and not the defendant fired the shot from the effects of which the said Sarina Trobough afterwards died. In this connection you are instructed that the defendant is not bound to prove that another fired the shot from which effects the said Sarina Trobough died, but it is enough if from the consideration of all the evidence there is a reasonable doubt in the minds of the jury whether or not another fired the shot, and if after a consideration of all the evidence there is a reasonable doubt in the minds of the jury as to who fired the shot that struck the said Sarina Trobough from which she afterwards died, then it is your duty to acquit the defendant and your verdict should be not guilty."

The theory of the defendant was that the shot which killed Mrs. Trobough was fired by the lodger Tooley but was intended for the defendant, and there was some evidence tending to prove that Tooley and the defendant had had some difficulty, and that Tooley had made threats against the defendant to a third party, and that it was possible for Tooley to have fired the shot through the space between the door jamb to which the hinges were attached and the door, which there was evidence tending to prove was partially open. We think under these circumstances

it was error for the court to refuse the instruction asked. The substance of the instruction was not covered by those given by the court on its own motion, nor this theory of the defense presented to the jury in any way. The instructions of the court are not open to criticism so far as they go, but deal, with one exception, with the questions of the degree of the crime, the burden of proof, and definitions. The exception referred to is No. 13, which is the only one authorizing the jury to return a verdict of not guilty if the state has failed to prove beyond a reasonable doubt the material allegations of the information. The state answers this objection by saying, "this theory, as far as it affected the defendant, amounted to no more than that he was not guilty of the crime;" but the defendant had a right to have his theory of the case, when supported by some evidence, submitted to the jury for their consideration. *Pospisil v. Acton,* 118 Neb. 200; *Osborne v. State,* 115 Neb. 65; *Jackson v. Commonwealth,* 96 Va. 107; *State v. Brady,* 121 Ia. 561; *People v. Cummins,* 47 Mich. 334; *State v. Tough,* 12 N. Dak. 425.

The other assignment of error which we will notice is the refusal of the court to give instruction No. 10 requested by the defendant, as follows:

"You are instructed that in order to sustain a conviction for a felony on purely circumstantial evidence the circumstances pointing to the guilt of the accused must be of so conclusive a character as to exclude every other reasonable hypothesis. It is not sufficient that the circumstances when taken together create a probability, although a strong one, of the guilt of the accused, but if the facts can be accounted for or explained upon any other reasonable hypothesis than the guilt of the defendant, then your verdict should be not guilty."

In *Wakeley v. State,* 118 Neb. 346, it was held error to refuse a cautionary instruction on the subject of circumstantial evidence where the evidence is wholly circumstantial in its nature. In the present case there were no eyewitnesses as to who fired the fatal shot, but that fact had to be determined by the jury from all the circumstances

shown in the evidence surrounding the tragedy. It was clearly a case where the cautionary instruction should have been given as requested by the defendant.

For the errors above pointed out the judgment is reversed and the cause is remanded.

REVERSED.

IN RE ESTATE OF THEODORE R. FRERICHS. RICHARD F. FRERICHS, EXECUTOR, APPELLANT, V. L. RAYMOND FRERICHS, APPELLEE.

FILED DECEMBER 5, 1930. No. 27615.

1. **Executors and Administrators**: PROBATE JURISDICTION: TERMINATION. Under our statutes, the probate jurisdiction of the county court ceases when an executor, who is also a trustee under the will, makes his final settlement.
2. **County Courts**: EQUITY POWERS. In exercising its exclusive original jurisdiction over estates, the county court may apply equitable principles to matters within the scope of its probate jurisdiction, but it has no general equity jurisdiction.
3. **Trusts**: TRUSTEES: BONDS. When the testator by his will creates a trust in favor of a minor and requires no bond or security of the trustee, the county court cannot demand such bond or security unless probability of loss to the *cestui que trust*, or some other equitable ground, is shown.
4. ———: ———: MISAPPROPRIATION OF FUNDS: INJUNCTION. "A court of equity has jurisdiction to enjoin a trustee from the misappropriation of trust funds at the suit of a *cestui que trust*." *Coleman v. McGrew*, 71 Neb. 801.

APPEAL from the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Reversed, with directions.*

Pitzer & Tyler and *Lloyd E. Peterson*, for appellant.

Edwin Moran, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

GOSS, C. J.

This appeal was presented to this court as a case stated, under rule 9 of this court. The practice is commended. It is not only an advantage to the parties, because it al-

lows an advancement for speedy hearing, but is a distinct aid to counsel and particularly to the court, in that the case stated by agreement of the parties is, under this rule, printed in appellant's brief.

Theodore R. Frerichs died testate in Otoe county, April 8, 1928. His will was duly probated. Richard F. Frerichs, one of his sons, was named in the will as executor and he qualified and acted as such. He was also named in the will as trustee for certain legacies and distributive shares of estate property bequeathed to him in trust. One of these trust bequests was for one-third of the residue bequeathed in trust for L. Raymond Frerichs, the minor son of the testator. The trust was to continue until the minor should reach the age of twenty-six, with a devise over to two other sons if the minor should die without issue within that period. The minor's interests have been cared for in the county court, in the district court and here by a guardian *ad litem*.

At the completion of the administration of the estate, the executor, Richard F. Frerichs, submitted with his final report the receipt of Richard F. Frerichs, trustee, for the property going to him as trustee under the will. All of the property was personal and aggregated about $19,500. The guardian *ad litem* objected to the discharge of the executor without the trustee giving bond for the faithful performance of the trust and without a requirement that the trustee be held accountable to the county court during the continuance of the trust. It was agreed that the estate was solvent and was fully settled except for the establishment or turning over of the trust.

The facts relating to the trust are shown by one paragraph of the will:

"Sixth. Of the residue and remainder of the property of my estate, I give, devise and bequeath a one-third share thereof each to my sons Richard F. Frerichs and T. Sterling Frerichs. The other one-third share of said residue I give, devise and bequeath to my son Richard F. Frerichs, as trustee, however, in trust for these purposes and with these powers, to wit:

"To receive the same from himself as executor of my estate at the termination of regular administration thereof, or not later than one year from the time of my death if such administration continues longer, and to hold, manage and control the same with full power to sell and convey the whole or any part of said property and to keep the same invested safely and securely for the production of the most income consistent with security; and to pay all net income received therefrom annually, or oftener if preferred, to my wife M. Anna Frerichs until my son L. Raymond Frerichs reaches the age of twenty-six years, thereby to insure the comfortable maintenance of my wife and said son during said time and to provide for his education. Should my wife's death occur before my son L. Raymond Frerichs reaches the age of twenty-six years, this trust shall nevertheless continue to the same time, in which case my said trustee shall pay said income or such part thereof as may be needed to or for the benefit of my son L. Raymond Frerichs; but subject to this further condition, that should my said son L. Raymond Frerichs die before reaching the age of twenty-six years leaving no issue surviving him, all of said property so held for him shall at that time pass to and vest in my two sons Richard F. Frerichs and T. Sterling Frerichs in equal shares; and shall then be distributable to them, subject only to the trusts in the preceding paragraphs of this will."

The county court held that, the testator not having required a bond of the trustee and no showing of changed conditions having been made, it was not necessary for the trustee to give bond, and that the county court did not have jurisdiction to administer the trust estate. On appeal by the guardian *ad litem*, the district court found that the naming of the trustee in the will was in the nature of the appointment of a testamentary guardian, and that section 1586, Comp. St. 1922, applies; and ordered the county court to require a bond of the trustee for 125 per cent. of the gross value of the trust estate, and that the trustee take oath and administer the trust estate under

orders of the county court. The executor was denied his discharge except on these conditions.

Section 1586, Comp. St. 1922, provides that a surviving parent may, by will, appoint a testamentary guardian of a minor. But the record here shows (1) that the testator was not the surviving parent, and (2) that the trust established by the will was to continue until the beneficiary became twenty-six years of age, or five years beyond his majority. Both of these conclusions of fact indicate that this was not a testamentary guardianship and that section 1586 is not applicable.

Under the Constitution of Nebraska county courts "shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, and in such proceedings to find and determine heirship; appointment of guardians and settlement of their accounts; and such other jurisdiction as may be given by general law." Const. art. V, sec. 16. The general law provides for the civil and probate jurisdiction of county courts. It gives to the county court exclusive jurisdiction over probate of wills, administration of estates, and guardianships. It requires executors, administrators and guardians to exhibit and settle their accounts and to "account for the estates and property that have come into their possession as such." Comp. St. 1922, secs. 1128, 1129, 1130.

We are cited no special statute, and we find none, extending the jurisdiction of the county court over an express trust, definitely and clearly stated, as this one is, so as to attach to it terms and conditions not stated by the testator when he created the trust and so as to require supervision by the county court during the life of the trust.

In discussing jurisdiction of probate courts as limited to devolution of property, Woerner says: "So the probate court has no jurisdiction of questions between trustee and beneficiary, or to compel an accounting between a testamentary trustee and the *cestui que trust.* * * * The jurisdiction of the probate court ceases, when an executor, who is also trustee, has made his final settlement. * * * In some states, however, statutes confer continuing ju-

risdiction on probate courts over testamentary trusts to some extent. * * * Statutes providing for settlements by trustees in probate courts refer only to express trusts created by will. Independently of statute, as we have seen, probate courts possess no original chancery powers, although they may apply equitable principles in matters within the scope of their jurisdiction." Woerner, American Law of Administration (3d ed.) sec. 151.

Under the subject of "Trusts," edited by Frank Irvine, it is said: "In a proper case, the court may, by virtue of its inherent chancery jurisdiction over trust estates, require the execution of a bond for the faithful administration of the trust. It is optional with the creator of the trust to require a bond or not, and a trustee should not be called on for security when the creator of the trust required none of him and no probability of loss is shown. * * * Testamentary trustees are now quite generally required by statute to give bonds." 39 Cyc. 254, 255.

The proposition that a trustee need not be called upon to give security unless upon a probability of loss, when the creator of the trust had required no security, is supported by the following cases: *Berry v. Williamson,* 11 *B. Monroe* (Ky.) 245; *Holcomb v. Coryell,* 12 N. J. Eq. 289; *Gaither's Guardian v. Gaither,* 213 Ky. 330.

It was argued at the bar that, if it should be held that the trustee is, in the circumstances, not required to give a bond, as a condition of turning over the trust funds, but it should appear thereafter that loss might be anticipated or result from his trusteeship, then there would be no way in which the rights of the *cestui que trust* could be protected, at least during the remaining year or so of his minority. This court has frequently held that "A court of equity has jurisdiction to enjoin a trustee from the misappropriation of trust funds at the suit of a *cestui que trust.*" *Coleman v. McGrew,* 71 Neb. 801; *Wunder v. Crane,* 100 Neb. 446; *Blake v. Chambers,* 4 Neb. 90; *Adams v. Dennis,* 76 Neb. 682. Section 8531, Comp. St. 1922, is the authority of the Code to the effect that the action on

behalf of an infant may be brought by his guardian or next friend.

The testator, who was sufficient of a man of business to accumulate considerable property in a small town and to preserve it in unusual form for these times, chose one of his sons to be the executor of his will and to be the trustee of a portion of the estate for another son. Presumed to know that a bond was not demanded by the law for the faithful performance of the responsibility of the trustee, the testator, by the terms of the will, exacted none. We therefore must assume that he had great confidence in the business ability and integrity of the trustee. In the county court and in the district court no charge was made, nor was there any suggestion here, that any probable loss might occur if the trustee gave no bond. Had there been such a showing in the county court, there might have been a different order there; for, while that court has exclusive original jurisdiction of estates, yet "In exercising that jurisdiction it may incidentally determine equitable questions, but the county court has no general equitable jurisdiction." *In re Estate of Wilson,* 97 Neb. 780. The legal title to the trust property was bequeathed to the trustee. Save on such equitable grounds as might incidentally be considered in that court in relation to his fitness, the county court could neither add to nor take from what the will gave him. To say otherwise would logically lead to the conclusion that every trust for a minor must come under the probate jurisdiction of the county court. Under the Constitution, that is a matter for the legislature, and not for the courts. We are of the opinion that the trust was fully established, that the receipt presented by the trustee was proper, that the record shows no right to exact a bond from the trustee, and that the county court correctly decided the issues presented.

For the reasons given, the judgment of the district court is reversed and the cause remanded, with directions to enter judgment in conformity with this opinion and to certify the same to the county court.

REVERSED.